
United States
Circuit Court of Appeals
For the Ninth Circuit.

MISSION TRANSPORTATION AND REFINING COM-
PANY, a Corporation, Claimant of the Barkentine
"FULLERTON," etc.,

Appellant and Cross-Appellee,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Appellee and Cross-Appellant.

Supplemental Apostles on Appeal.
Additional Testimony.

Upon Appeal and Cross-Appeal from the United States
District Court for the Northern District of California,
First Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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**[Notice of Motion, Stipulation and Proposed Order
Allowing Supplemental Record to be Filed.]**

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2262.

MISSION TRANSPORTATION AND REFIN-
ING COMPANY, a Corporation, Claimant of
the Barkentine "FULLERTON," etc.

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
TION,

Appellee.

**NOTICE, STIPULATION AND ORDER FOR
FILING OF SUPPLEMENTAL RECORD.**

You and each of you will please hereby take notice that Mission Transportation and Refining Company, a corporation, appellant and cross-appellee herein, will on Monday, the fifth day of May, 1913, at the hour of 10:30 o'clock A. M., of said day, or as soon thereafter as counsel may be heard, move the above-entitled court for an order permitting said appellant to file a supplemental record herein in lieu of an order directing the diminution of the record on file in the above-entitled matter. Said motion will be made upon the ground that a material part of the testimony taken in the trial court in said action has been

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inadvertently omitted from the record now on file in
this court.

Dated, San Francisco, California, May 3, 1913.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Said Appellant.

IT IS HEREBY STIPULATED AND
AGREED that the foregoing statement is true and
correct. It is further stipulated that the above-
entitled court may make an order permitting the fil-
ing of a supplemental record herein, as hereinbefore
prayed for, by Mission Transportation and Refining
Company, a corporation.

Dated, San Francisco, California, May 3, 1913.

J. E. FOULDS,

ANDROS & HENGSTLER,

LOUIS T. HENGSTLER,

Proctors for Southern Pacific Company, Appellee
and Cross-Appellant.

Pursuant to the foregoing Notice of Motion and
Stipulation of the parties hereto, IT IS HEREBY
ORDERED that Mission Transportation and Refin-
ing Company, a corporation, appellant and cross-
appellee herein, may have to and including the
thirty-first day of May, 1913, within which to file a
supplemental record herein.

Dated, San Francisco, California, May 5, 1913.

_____ J.,

_____ J.,

_____ J.

[Endorsed]: No. 2262. In the United States Cir-
cuit Court of Appeals, for the Ninth Circuit. Mis-

sion Transportation and Refining Company, a Corporation, Claimant of the Barkentine "Fullerton," etc., Appellant, vs. Southern Pacific Company, a Corporation, Appellee. Notice and Stipulation for Filing of Supplemental Record. Filed May 5, 1913. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifth day of May, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

[Order Allowing Mission Transportation and Refining Co. to File a Supplemental Apostles on Appeal and Continuing Appeal to October, 1913, Session.]

No. 2262.

MISSION TRANSPORTATION & REFINING
COMPANY, etc.,

Appellant and Cross-Appellee,

vs .

SOUTHERN PACIFIC COMPANY, etc.,

Appellee and Cross-Appellant.

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On motion of Mr. Joseph A. McKeon, on behalf of counsel for the respective parties, and pursuant to the stipulation of counsel, this day filed, it is ORDERED that the Mission Transportation & Refining Company be, and hereby is allowed to and including the 31st instant within which time to file a Supplemental Apostles on Appeal in the above-entitled cause, and, on the further motion of Mr. McKeon, it is FURTHER ORDERED that the appeals in the above-entitled cause be, and hereby is continued to the October, 1913, session of the court.

Additional Testimony.

[**Testimony of Robert Boyd Hemming, Jr., for Claimant.**]

ROBERT BOYD HEMMING, Jr., called for the claimant, sworn.

Mr. CAMPBELL.—Q. What is your name, Mr. Hemming?

A. Robert Boyd Hemming, Jr.

Q. What is your present business?

A. I am the master of a motor boat at the present time.

Q. Were you employed on board the barkentine "Fullerton" at the time of the collision with the "Transit?" A. Yes.

Q. How long had you been previously employed on that boat?

A. I had been several months on that vessel.

Q. In what capacity were you acting at the time of the collision? A. As night watchman.

(Testimony of Robert Boyd Hemming, Jr.)

Q. Where was the "Fullerton" anchored at the time of the collision?

A. About abreast of the block between 17th street and 18th street.

Q. Will you indicate upon either one of the charts, Claimant's Exhibit 1 or 2, about where the "Fullerton" was.

A. It was about here, somewhere (pointing).

Q. Mark that with the letter "H." A. Yes.

Q. On Claimant's Exhibit 1?

A. It is about there, about very near on a line of Goat Island with Hunter's Point, and straight off from the block between 17th and 18th.

Q. What bearings, if any, have you used in locating the "Fullerton" at the point H?

A. A line between Goat Island and Hunter's Point drydock smokestack, and about straight off from 17th Street, or the block thereabouts.

Q. Will you look here to see whether the two points you refer to are on the map—is Goat Island marked on the chart? A. Yes; this is Goat Island.

Q. Where is Hunter's Point?

A. This is Hunter's Point, the [1*] smokestack is here (pointing).

Q. Is this the place that is marked Hunter's Point?

A. It is out here where the drydocks are on the end of that point.

Q. You say the "Fullerton" was anchored on a line between Goat Island and Hunter's Point?

*Page-number appearing at foot of page of original certified Record.

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(Testimony of Robert Boyd Hemming, Jr.)

A. Very close to a line; yes.

Q. About opposite between 16th and 17th Streets?

A. 17th, or a little above 17th Street; on an ebb tide you can look up 17th Street from the stern end of the vessel.

Q. Which way would her stern be pointing on the ebb tide?

A. Close to north, maybe a little west of north, the stern would be pointing.

Q. Where did the forbidden anchorage extend?

A. At that time the forbidden anchorage, the most southerly line extended from the corner of 16th Street to the Alameda pier, I believe.

Q. Do you recall when you had anchored in that position, can you recall the date? A. No.

Q. What month was it during?

A. The latter part of September or October; somewhere along there, I think.

Q. How long, in your judgment, had you been anchored in that position prior to the collision?

A. We had been there ever since the vessel laid up; she anchored there and laid up.

Q. Don't you recall at this time what month it was that you anchored there?

A. I have some remembrance of being there during the month of October.

Q. Was the "Fullerton" ever changed from that anchorage either by the assistance of a tug or by the force of the wind or weather?

A. Not till after the collision.

(Testimony of Robert Boyd Hemming, Jr.)

Q. Were you on board the "Fullerton" at the time she was anchored? A. Yes.

Q. Do you remember what tug anchored her?

A. I have forgotten which one. [2]

Q. Were you in the courtroom this morning?

A. Yes.

Q. Did you hear the master of the "Transit" refer to a southeast gale in the month of December?

A. I heard him speak of it; yes.

Q. Have you a recollection of that gale?

A. We had several blows; I don't remember that we had the one he spoke of.

Q. Was the "Fullerton" ever blown from the former place of anchorage between the time that she was first anchored and the collision—was she ever shifted by the wind or current from the place of her first anchorage?

A. Not to my knowledge; she had the same bearings as when we dropped the anchor first; in dropping two anchors and heaving it up she might be shifted a few feet, but it is doubtful.

Q. How many anchors did you have aboard the "Fullerton"? A. Two anchors.

Q. Do you know what the weight of them were?

A. I think 3,000 pounds a piece.

Q. Have you any knowledge, yourself, certain knowledge, of the weights of those anchors—did you ever see them weighed?

A. I remember seeing them marked on the castings.

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(Testimony of Robert Boyd Hemming, Jr.)

Q. What was the weight of them if you know?

A. I think 3,000 is marked on them.

Q. How much anchor cable did you have?

A. We always let out about 60 fathoms.

Q. What cable did you have on board, what length of cable?

A. We had one chain that had 70 fathoms and the other 90 or more.

Q. Which anchor did you have out that night?

A. The port anchor. [3]

Q. What length of cable did you have out?

A. I think we had 60 or 65 fathoms; 60 fathoms in the water.

Q. What was the depth of the water at that place?

A. In the vicinity of about 45 or 50 feet.

Q. In fathoms? A. About 8 or 9 fathoms.

Q. When the "Fullerton" was swinging to an ebb tide, so that her stern was nearest the fairway or forbidden anchorage, will you state whether or not she was anchored so near to the forbidden anchorage that she would swing into the same or near the southern edge of it?

A. She could not swing over the line between the 16th Street Dock and Hunter's Point with her stern; if she had all the cable she could not reach that by a long ways.

Q. Answer my question, please. When she was swinging to an ebb tide with all of her cable out, would she swing into the forbidden anchorage?

A. No.

(Testimony of Robert Boyd Hemming, Jr.)

Q. How far in your judgment was she from the southerly line of the forbidden anchorage extending from the 16th street dock to the Oakland mole?

A. Well, I should judge it would be half a mile.

Q. With what length of cable did you usually lay?

A. About 60 or 70 fathoms.

Q. What length of cable did you have out the night of the collision?

A. I don't remember exactly, but I think we had about 60 fathoms in the water.

Q. Who was on watch at the time of the collision?

A. I was on watch.

Q. What were the hours of your watch?

A. From sunset until sunrise.

Q. Who had the other watch? A. Olson.

Q. What type of a vessel is this boat?

A. Four-masted barkentine. [4]

Q. What was she used for? A. Carrying oil.

Q. From where?

A. From the coast to the Islands, and up and down the coast at that time.

Q. Why did you take the night watch and Olson take the day watch?

A. Well, there were several reasons; there was work to be done, such as painting, and the like of that, that he would do on his watch in the daylight.

Q. Why were you taking the night watch?

A. We had to have a night watchman to look after the lights and bell.

Q. What character of lights did you have aboard the vessel?

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(Testimony of Robert Boyd Hemming, Jr.)

A. Ordinary ship-riding lights; about 8 or 9 inch lenses on them, or globes.

Q. What character of lights were they?

A. They were electric lights.

Q. Electric lights? A. Yes.

Q. Was the electricity generated aboard by means of a dynamo? A. Yes.

Q. Where was the dynamo and engine located?

A. Underneath the forecastle-head.

Q. Underneath the forecastle-head? A. Yes.

Q. Where was the riding light hung?

A. The riding light was hung on the forestay, above the windlass.

Q. That would be above the forecastle-head?

A. Yes.

Q. Where was the after light?

A. The after light was hung under the jigger-boom.

Q. That would be immediately over the cabin?

A. Yes, so it would show all around, above the cabin.

Q. What time did you go on watch the night of the collision?

A. I started the lights about 5 o'clock or at sun-down—a little before. [5]

Q. What kind of an engine was the dynamo run by? A. Gasoline.

Q. What attention, if any, did you have to give the gas engine?

A. I would fill up the lubricators about once every three or four hours.

(Testimony of Robert Boyd Hemming, Jr.)

The COURT.—Has that question any importance, the lights?

Mr. CAMPBELL.—Question has been made in the depositions that this man, because he was attending to the engine, was taken away from the duty of a lookout.

The COURT.—Very well.

Mr. CAMPBELL.—Q. Would you state whether or not the running of the engine requires your attendance in the engine-room? A. No, sir.

Q. How often did you have to go into the engine-room?

A. About every three or four hours to oil up.

Q. What time did the fog set in?

A. Around 11 o'clock, over where we was.

Q. Did you see the "Transit" when she left the Mission Bay slip on her 9 o'clock trip? A. Yes.

Q. The tide was flooding at the time of the collision? A. Yes.

Q. Will you state to the Court just what you did from the time the fog had begun to set in up to the time of the collision.

A. When the fog began to set in, that is, it had been foggy in the center of the bay around Goat Island, and up the bay quite some time before it got foggy where we were.

Q. Point out on the chart where that was.

A. The fog was thick up around this part here, and was gradually drifting down; about when the "Transit" left on the 9 o'clock trip, I saw her go into the

(Testimony of Robert Boyd Hemming, Jr.)

fog about here; but it remained clear down where we were until about 11 o'clock. [6]

Q. Go ahead and tell what happened and tell what you did.

A. It set in foggy around 9 o'clock, and I only rang the bell a few times and she lifted, the fog lifted; about 11 o'clock it started in setting in foggy, and I started in ringing the bell again.

Q. Where was this bell located?

A. The bell was located on the foremast of the ship.

Q. Go ahead. What did you do from that time on?

A. I heard the "Transit" approaching, what I believed to be the "Transit" from her whistle. I kept trying to look out for her, and kept striking the bell in between the whistles when I had a chance so as to give somebody on her a show to hear it. It was not very long after I heard her whistle that I saw the loom of her lights through the fog, and when she was about three ship-lengths away, I could see both of her range lights, one immediately after the other. She was approaching us on our starboard side just a little forward of amidship, it seemed, from where I was. Then she seemed to turn and cross our bow, and if I remember rightly, I heard two or three short blasts, like a short blast from a whistle. I struck the bell again, and it seemed that the collision was unavoidable, and I left the forecastle-head then because I was afraid that if she hit our headgear the yards

(Testimony of Robert Boyd Hemming, Jr.)

would drop down and the topmasts, and that was a dangerous place to be.

Q. How long intervened between the time that you left your fore-castle-head and the collision?

A. Well, that is hard to say, exactly how long.

Q. Was it a perceptible length of time?

A. I had time to go as far aft as the mizzen rigging, a little over two-thirds of the way back. [7]

Q. What was the position of the "Transit" when you left the fore-castle-head?

A. It was about a half a ship's length off our star-board bow.

Q. Which way was she coming?

A. She was coming right for us, and swinging to cross our bow all the time.

Q. Which way would her bow be swinging?

A. Her bow was swinging to starboard.

Q. Will you take these two models and show the position of the two vessels just at the time when you first saw them and secondly when you left the fore-castle-head?

A. Well, say, this is the "Fullerton" here, and I was on the vessel forward here; from where I looked the two range lights on the "Transit" appeared to be coming off about here.

Q. About abreast of your main rigging?

A. Between the fore and main rigging.

Q. Place the two models on the paper where you first saw her from you. A. About that.

Q. I want you to place these models on the paper

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(Testimony of Robert Boyd Hemming, Jr.)

in the position of the two vessels when you first saw the range lights.

A. Well, they were quite a distance apart.

Q. I do not want you to show anything about the distance between them. I simply want you to show how the two vessels were heading.

A. About that.

Q. Is that right? A. Yes, about that.

Q. Where does the "Transit" carry her range lights?

A. They are above, higher than the wheel-house on each end.

Q. What kind of lights are they?

A. I don't know. I believe she had kerosene lights at that time.

Q. Are they colored lights or white lights?

A. White lights.

Q. How are they arranged—so that they are visible all around the horizon? [8]

A. Yes, except when the smokestack comes in between one, it would hide it.

Mr. CAMPBELL.—I will offer that in evidence. (The paper is marked Claimant's Exhibit 6.)

Q. I want you to show me the position of the two vessels at the time you left the fore-castle-head.

A. It would be about that way.

Q. How far off from the "Fullerton" would you say that the "Transit" was at that time?

A. About a half or three-quarters of a ship-length.

Q. What would that distance be in feet?

(Testimony of Robert Boyd Hemming, Jr.)

A. About from 150 to 200 feet.

Mr. CAMPBELL.—I will offer that in evidence.

(The paper is marked Claimant's Exhibit 7.)

Q. Where were you stationed during the time the fog prevailed from 11 o'clock?

A. Sometimes I would walk the main deck, and sometimes on the fore-castle-head.

Q. How could you ring the bell?

A. There was a bell-cord led across from the main mast to the railing on the fore-castle-head.

Q. Main mast or fore mast?

A. From the fore mast to the railing on the fore-castle-head.

Q. When you were walking on the fore-castle-head how would you ring the bell?

A. Get hold of the cord from the hand-rail.

Q. What was the distance of the bell on the fore mast from the fore-castle-head?

A. About 6 or 8 feet.

Q. When you were walking on the main deck where would you walk?

A. Across in front of the fore mast, across the deck forward of the fore mast.

Q. Just abaft the break of the fore-castle-head?

A. Yes.

Q. How would you ring the bell from that position? [9]

A. Reach up and catch the cord and ring it.

Q. Will you state whether or not you rang the bell during the time the fog prevailed after 11 o'clock.

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(Testimony of Robert Boyd Hemming, Jr.)

A. Yes.

Q. How would you ring it, in what way?

A. I would ring it for about 15 to 25 strokes of the bell.

Q. What kind of strokes?

A. Ding-ding, ding-ding; like that.

Q. How often would you ring it?

A. About, as near as I could judge, once a minute.

Q. Did you hear the "Transit" approaching?

A. Yes.

Q. How long in your judgment did you hear her before the collision?

A. Well, I heard her blow about 3 or 4 blasts of her whistle before I saw her.

Q. How long prior to the time that you first heard her whistle had you been ringing the fog-bell?

A. From quarter to half an hour, something like that; a little over, maybe.

Q. Was there any time during that interval that you had not been ringing the fog-bell?

A. Not that I remember of.

Q. Have you a recollection that you did ring it or did not ring it? A. Yes, I rang the bell.

Q. Was there any time after the fog set in at 11 o'clock that you left the deck or the fore-castle-head to go into the engine-room? A. No.

Q. When had you last oiled the engine?

A. At about 9 o'clock when the "Transit" left.

Q. When was the next hour for oiling?

A. Around 12 o'clock midnight.

Q. How many times during the period that you

(Testimony of Robert Boyd Hemming, Jr.)

were stationed aboard the "Fullerton" would you say that the "Transit" had passed back and forth across the bay? [10]

A. Well, to my knowledge she had a very irregular service there; sometimes she would make several trips a day and other times she only appeared to make about 3 trips, a day.

Q. How close would she pass to you on the different tides?

A. Well, that distance varied; at times she would come up so close that I had to haul my small boat up out of the way.

Q. On what tide would that be?

A. On an ebb tide.

Q. Which way *way* would the stern of your vessel be drifting?

A. The stern would be tailing to the northward.

Q. How close would she pass to you on the flood tide?

A. Well, sometimes she came up quite close even on the flood tide.

Q. During this night prior to the collision did you hear the 16th Street Mission Bay bell ring?

A. Not that night. I don't remember of hearing it before the collision.

Q. Had you had any fogs prior to the night of the collision? A. Yes.

Q. What had been your experience with the "Transit" coming close to you or passing you at a distance?

A. There was only once that she came very close to us in a fog before; then she crossed our bow when

(Testimony of Robert Boyd Hemming, Jr.)

we were laying at an ebb tide.

Q. Laying at an ebb tide? A. Yes.

Q. How far off, in your judgment, was the "Transit" when you first saw her?

A. Between three and four ship-lengths.

Q. I will ask you whether or not in your judgment if she had starboarded her helm at that time, with a flood tide, she could have gone under your stern?

A. I believe she could have gone clear of our stern easily.

Q. Were there any other vessels anchored in that vicinity? A. Yes. [11]

Q. What vessels?

A. There was the coal barge "Ruth."

Q. Where was she anchored?

A. She was anchored between our vessel and 16th Street.

Q. Where was she with respect to being ahead or astern of you?

A. She was lying—she would be lying ahead of us.

Q. Would that be nearer or farther away from the *the* fairway? A. Closer to the fairway.

Q. What other vessels were anchored there that night?

A. There were several small barges and the "Sonoma" and "Ventura," I think.

Q. Where were they anchored?

A. They were anchored between our vessel and the Risdon Iron Works and the sugar-house.

Q. Where were the "Sonoma" and the "Ventura" anchored with respect to the Union Iron Works?

(Testimony of Robert Boyd Hemming, Jr.)

A. One of them was very nearly abreast of the Union Iron Works.

Q. Where were the others?

A. The other one was closer up to the sugar-house.

Q. The sugar-house is farther south than the Union Iron Works? A. Further south.

Q. Did you see the steamer called the "Lansing" that night?

A. She was lying between our vessel and Hunter's Point.

Q. Between your vessel and Hunter's Point?

A. Yes.

Q. How far away from you was she lying?

A. About three-fourths of a mile, I should judge.

Q. Where was she with respect to the sugar-house?

A. She was a little to the southward of being abreast of the sugar-house.

Q. What was her direction with respect to your stern?

A. On the flood tide our stern pointed almost straight for the "Lansing." [12]

Q. Had your anchorage position been changed at all during the last two or three days preceding the collision?

A. Not enough to change our bearing.

Q. Was there any wind that night, Mr. Hemming?

A. There was a light breeze from the northeast.

Q. From the northeast? A. Yes.

Q. How was your vessel pointing on the flood tide?

A. Pointing very nearly north.

Q. How was the direction of the wind with respect

(Testimony of Robert Boyd Hemming, Jr.)

to the course of the "Transit"?

A. It was very nearly from the "Transit" toward us.

Q. Why was it that you left the forecastle-head, what was the reason for it?

A. I was afraid if she carried away our top gear that the top mast and yards would come down.

Q. Did you think at that time that a collision was unavoidable? A. Yes.

Q. Where was she anchored the next morning with respect to the anchorage of the previous night?

A. She was in the same place, or very close to it.

Q. Did you hear the statement of the first officer of the "Transit" in which he said she was anchored next morning off the sugar-house, to the southward of the Union Iron Works? A. Yes.

Q. Will you state whether or not that is correct?

A. He is mistaken there.

Q. Will you state whether or not if you had drifted to that position it would be necessary for you to have drifted past the "Sonoma" and "Ventura"?

A. To be abreast of the sugar-house I would have to pass both those vessels.

Q. Do you know the size of the bell that was on the "Fullerton"?

A. It was about a 9 or 10 inch bell. [13]

Q. Could you hear the paddle-wheels or any noise from the "Transit" as she approached? A. Yes.

Q. What noises did you hear?

A. The thumping of the paddle-bucket and the wash of the water under the bows.

(Testimony of Robert Boyd Hemming, Jr.)

Q. I will ask you whether or not the fog-bell on Mission Slip always rang during the fog.

A. There were times that I heard the boats going in there; they would have to blow several blasts to get the bell going before going into the slip.

Q. What kind of a bell was it, do you know?

A. I don't remember of seeing it. It must be a fairly good-sized bell—a bell rung by hand, I suppose.

Cross-examination.

Mr. HENGSTLER.—Q. How old are you, did you say, Mr. Hemming? A. 28.

Q. When were you first employed on the "Fullerton"? A. On June 10, 1909.

Q. On June 10, 1909? A. Yes.

Q. You remember that date distinctly, do you?

A. I am very certain of it.

Q. Where was the "Fullerton" at that time?

A. At the Union Iron Works.

Q. When did you first go on board of her?

A. To go to work on board of her?

Q. Yes.

A. Why, on that date at the Union Iron Works in the drydock.

Q. What was your business before June 10, 1909?

A. I was engineer and winch-driver on the "Santa Paula."

Q. Engineer and winch-driver employed on what?

A. On the barge "Santa Paula." [14]

Q. How long were you employed as such on that barge? A. Four years and about a month.

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(Testimony of Robert Boyd Hemming, Jr.)

Q. You say that is a barge or a bark?

A. A barge.

Mr. CAMPBELL.—Q. A steam schooner?

A. A tow.

Mr. HENGSTLER.—Q. Has that barge any power of locomotion? A. No.

Q. It is a barge that can only move by its being towed? A. Yes.

Q. You say you were engineer on her and what else? A. Winch-driver.

Q. By “engineer” you mean what—what duties did you have to perform on that barge?

A. Run the engine and windlass for hoisting sails and anchors and pumps.

Q. That is the donkey-engine that is used on that barge? A. The same as the donkey-engine.

Q. For the purpose of loading and unloading, isn't it? A. Yes.

Q. Just running a donkey-engine, isn't it?

A. Yes.

Q. Had you ever been employed as a sailor before that on any vessel, either steam vessel or sailing vessel? A. Only on small boats about the bay.

Q. You have never been on deep-sea vessels, have you? A. Only those two.

Q. What ones?

A. The barge “Santa Paula” and the barkentine “Fullerton.”

Q. Those were the only large vessels that you have ever been employed on in any capacity, were they?

A. Yes.

(Testimony of Robert Boyd Hemming, Jr.)

Q. You are not a sailor, are you?

Mr. CAMPBELL.—What do you mean by a sailor?

Mr. HENGSTLER.—Q. You have never gone to sea?

A. Yes, I have gone to sea. [15]

Q. In what vessel?

A. In the "Fullerton" and the "Santa Paula."

Q. In the "Fullerton"? A. Yes.

Q. Whereabouts did you go in the "Fullerton"?

A. To Honolulu.

Q. Were you a member of the crew at the time you went to Honolulu on the "Fullerton"?

A. Yes.

Q. When was that?

A. That was in the first part of July, 1909; we landed in Honolulu on July 14th or 15th, 1909.

Q. Then you came back to San Francisco in her, did you? A. Yes.

Q. What did you do during the voyage, did you have to run an engine or what was your work?

A. Running the engine for getting up sails, and pumps for washing the decks, and the like.

Q. That was again running a small engine, was it not? A. Yes.

Q. A donkey-engine for the purpose of running the electric lights? A. Yes.

Q. But you have never had anything to do with navigation, have you?

A. In small boats I have.

Q. Small boats, what do you mean by that?

(Testimony of Robert Boyd Hemming, Jr.)

A. Well, in launches and yachts.

Q. About the bay? A. Yes.

Q. You say the "Fullerton" came to anchor in about October, 1909, in this bay?

A. About that time.

Q. Who gave you instructions at that time as to what you were to do on board of the "Fullerton"?

A. Captain Grant.

Q. Captain Grant did? A. Yes.

Q. What did he tell you?

A. That one man should keep the night watch and the other man the day watch.

Q. Is that all he told you?

A. That is all that I remember of. [16]

Q. Then you did that, you kept the night watch from the time you went on board until the time of this collision? A. Yes.

Q. How did you do that? What did you do when you kept the night watch?

A. Kept the lights clean and burning, rang the bell in case of fog; in case the wind should rise and there was danger of the ship dragging the anchor, letting go another anchor or pay out more chain, and when the wind went down, take up an anchor so as not to let the anchors get foul.

Q. Did you ever study the rules of navigation with reference to the lights which are required on a vessel? A. Yes, I have read the rules many times.

Q. When did you do that?

A. Several times when I have had copies of them. When I was in small boats, and at times when I was

(Testimony of Robert Boyd Hemming, Jr.)

at sea, if I had a copy of them I would look them over.

Q. What are the rules with reference to a vessel which is laying at anchor—what are the anchor lights prescribed by law?

A. A vessel of 150 feet and under has to have one light on the forward part of the vessel at a distance of about nearly 20 feet above the hull.

Q. Nearly 20 feet above the hull?

A. Yes. Over 150 feet she had to have a light forward and a light on or near the stern of the vessel to show all around the horizon; the forward must be not less than 20 feet and not over 40 feet on the beam of the vessel about the hull.

Q. How long have you known this rule, Mr. Hemming?

A. I could not say. I read the rules when I was in the small boats before I started going to sea; I started to go to sea in 1905.

Q. You mean by starting to go to sea going about the bay in these little launches?

A. No, going in the oil ships up and [17] down the coast, and I made a trip over to the Islands on the "Fullerton" when I was on her.

Q. It was at that time that you studied the rules with reference to anchor lights, was it, 1905?

A. Before that time, I remember of having one of these little copies of pilot rules and looking over it, seeing the rules for vessels at anchor in that.

Q. Did the captain instruct you as to what the rule was with reference to the anchor lights and to

(Testimony of Robert Boyd Hemming, Jr.)

look out for their position before he engaged you upon the "Fullerton"?

A. The place for the lights was always maintained there; the anchor lights were first put up by the mate of the vessel when she laid up.

Q. You never changed the anchor lights, did you?

A. No.

Q. They were electric bulbs that were fixed there when you first got there?

A. They were in lanterns, and you hoisted them up with a pulley to a block that was made fast.

Q. Did you do that?

A. Yes. If one of the globes burned out I would put in a new one and hoist the lamp up to where it belonged.

Q. Do you know how high the electric riding light in the fore part of the vessel was about the deck?

A. It looked to me about 20 feet above the windlass.

Q. About 20 feet; it might have been less, might it not?

A. Well, I could not say as to a couple of feet, but it is my opinion it was a good 20 feet.

Q. How high above the deck do you think the riding light, the anchor light of the "Fullerton" in the stern, was?

A. It was high enough above the poop deck to show above the captain's cabin, which was about as high as a man could reach [18] above the poop.

Q. With reference to the bell on the "Fullerton," was that same bell there when you first went on board

(Testimony of Robert Boyd Hemming, Jr.)

or has the bell been changed since that time?

A. The same bell was there.

Q. Do you know what the law prescribes with reference to the bell on a sailing vessel? Just say yes or no.

A. Yes.

Q. You do?

A. Yes.

Q. What is it?

A. It must be over 8 inches.

Q. It must be over 8 inches in the kind of vessels of the size of the "Fullerton"?

A. Yes.

Q. How long have you known that, Mr. Hemming?

A. I also learned that from the pilot rules.

Q. You also learned from the pilot rules that; you have also known that for years, have you?

A. Yes.

Q. What is the fog signal that the law prescribes in the kind of the vessels that the "Fullerton" is in foggy weather?

A. The bell has to be struck rapidly for about 5 seconds at intervals of not more than a minute.

Q. When did you first learn that?

A. Several years ago.

Q. You say you had never been on a sailing vessel as a night watchman before this—have you?

A. I have taken the night watch on the "Santa Paula" at odd times.

Q. While she was lying—

A. (Intg.) I would relieve somebody when she would be at anchor in the bay.

Q. When she would be at anchor in the bay?

A. Yes.

Q. Were you the regular night watchman at that

(Testimony of Robert Boyd Hemming, Jr.)

time or was somebody else the night watchman?

A. I would relieve the night watchman when he would go off for his supper, or sometimes would go ashore to get the captain, or something of that kind.

[19]

Q. Where was the bell located on the "Fullerton," just where? A. Just forward of the fore mast.

Q. Just forward?

A. Fastened to the fore mast.

Q. Was it set upon the deck or fastened in the rigging, or where was it?

A. It was on the mast itself.

Q. It was fastened on the mast itself? A. Yes.

Q. How high above the deck?

A. It was just a bit higher than the fore-castle-head.

Q. Just a bit?

A. A bit higher than the fore-castle-head; yes.

Q. A bit higher than the fore-castle-head, would that be within your reach? A. Yes.

Q. Would the clapper be within your reach?

A. The cord on clapper would.

Q. The cord on the clapper would be? A. Yes.

Q. How far down does that cord reach?

A. Well, the cord was about 10 feet long, 10 or 12 feet long, and of course there was bit of slack that would let it sag down so that you could reach it from the main deck or the fore-castle-head.

Q. Where did you usually stand when you used that cord for the purpose of ringing the bell, on the fore-castle-head or on the main deck?

(Testimony of Robert Boyd Hemming, Jr.)

A. Either place, whichever we chose; if it was blowing and raining and very cold, sometimes we would go behind the forecastle, where we would be a little sheltered, and we could look over each side and walk up on the forecastle at intervals.

Q. That night of the collision, where were you posted when you rang the bell after 11 o'clock [20]

A. On the forecastle-head and the main deck, both, at different times.

Q. Both at different times? A. Yes.

Q. You did not stay in one place?

A. No, I was walking the deck.

Q. You were walking the deck; what were you walking the deck for? A. To keep warm.

Q. How long did it take you to get up from the main deck to the forecastle-head?

A. It might be 2 or 3 seconds, about 7 or 8 steps.

Q. There are steps up or is it a ladder?

A. Steps.

Q. To what part of the forecastle-head did you have to go in order to ring the bell?

A. Just on the after part.

Q. Near the break or near the aft?

A. It is near the after part.

Q. Near the after part? A. Yes.

Q. How near the railing on the forecastle?

A. There was a railing across the deck, but you could keep your hand on it; you could walk back and forth across the forecastle-head.

Q. Was the rope of that bell anywhere near that railing? A. Fastened to the railing.

(Testimony of Robert Boyd Hemming, Jr.)

Q. It was fastened to the railing? A. Yes.

Q. How near to the steps between the main deck and the forecastle-head was the rope?

A. About 15 feet.

Q. About 15 feet. It was nearer to the port side, was it, to the port railing?

A. It came over a little nearer the starboard railing than amidship.

Q. The steps went up on the port side?

A. On both sides; steps on each side. [21]

Q. Now, you sometimes used one rope and sometimes you used the other rope—

A. We used the same rope.

Q. You used the same rope? A. Yes.

Q. But you were in two different positions, weren't you, when—

A. (Intg.) On the forecastle-head you used the end where it was fastened to the rail and on the main deck you took the slack and used it.

Q. It is the same rope? A. The same rope; yes.

Q. Did your engine require any attention during that time? A. Not that night.

Q. If it had required any attention you would have had to go into the engine-room?

A. I would have had to light the oil lights and called the day watchman out.

Q. You would have had to light the lights and called the watchman out?

A. Call him out to light them or light them myself.

Q. In the meantime there would not have been any lights on board, if that had happened?

(Testimony of Robert Boyd Hemming, Jr.)

A. Not until I had the oil lights hoisted up.

Q. Whereabouts were those oil lamps?

A. They were in the cabin.

Mr. CAMPBELL.—What has that to do with it; you have admitted already the lights were burning.

Mr. HENGSTLER.—I want to show that this man had too many duties to perform to be able to perform any of them properly.

Mr. CAMPBELL.—Go ahead.

Mr. HENGSTLER.—Q. I have forgotten what the captain told you when he instructed you in relation to your duties. What did he say to you?

A. He said one of us was to keep [22] the night watch and the other the day watch on the vessel.

Q. Then you arranged it between yourself that you were going to keep the night watch? A. Yes.

Q. What time that night did you go on watch?

A. When I lighted the lights I considered I was on watch; we were both on board the vessel.

Q. What time was it that night, if you remember?

A. Just a little before sun down, around 5 o'clock, or a little earlier.

Q. Where was the other man at about 11 o'clock, do you know? A. He was in his room, I believe.

Q. On the lower deck?

A. He was in the aft part of the vessel somewhere.

Q. Was there anybody else on board of the "Ful-lerton" at about 11 o'clock that night? A. Yes.

Q. Who was there?

A. My father was on board.

Q. Your father was on board; had he any duties on

(Testimony of Robert Boyd Hemming, Jr.)

board of that vessel to perform? A. No.

Q. What was he doing there?

A. He had been visiting me that day.

Q. When did he come on board?

A. I don't remember whether it was that same day or the day before.

Q. Where was he at 11 o'clock?

A. He was some place in the cabin aft.

Q. When did you leave your father—when did you last see him that evening?

A. As near as I remember, it was around 9 o'clock or a little after that he went to bed.

Q. Up to that time, till 9 o'clock, where were you, were you together?

A. We had been around the after deck talking together.

Q. Do you know whether or not he was on deck after 11 o'clock? [23]

A. I didn't see him until the time of the collision.

Q. Was he dressed when you first saw him?

A. I believe he had his clothes on.

Q. He had his clothes on. How soon after the collision did you see him? A. A very short time.

Q. A minute or two after the collision?

A. Just a very few moments.

Q. Where was he?

A. He was on the poop deck aft.

Q. On the poop deck? A. Aft.

Q. Dressed at that time?

A. I don't remember just how he was dressed, but he had some of his clothes on.

(Testimony of Robert Boyd Hemming, Jr.)

Q. Are you certain, Mr. Hemming, that your father was not with you at 11 o'clock, between 11 and half-past 11 in the forward part of the "Fullerton"?

A. He was not with me until after the collision.

Q. You are positive of that, that he was not with you at the time of the collision?

A. From the time he went to bed, which was around 9 o'clock, until the time of the collision, I did not see him.

Q. You did not see him until the time of the collision? A. No.

Q. You are positive he was not there just before the collision? A. He was not.

Q. What time on that evening before did you take your dinner?

Mr. CAMPBELL.—The same night or the night before?

Mr. HENGSTLER.—Q. The same night the collision happened?

A. I believe it was just after I hung the lights up we had dinner. I am not certain which; just before or just after.

Q. What time about would that be?

A. If it was after, which I believe it was, I believe that I came from putting the lights out and went right to dinner, had supper; that would be shortly [24] after 5 o'clock.

Q. Where did you take your dinner—up on the poop deck? A. In the galley.

Q. On board the "Fullerton"? A. Yes.

Q. Did you always take your meals aboard the

(Testimony of Robert Boyd Hemming, Jr.)

“Fullerton” or did you sometimes go ashore?

A. We cooked our own meals aboard there.

Q. Regularly? A. Yes.

Q. Once in a while you went ashore to take your meals?

A. Not to take my meals unless it would be that we might be visiting ashore, or something like that.

Q. Mr. Hemming, when you were engaged in the engine-room, you could not attend to the bell at the same time, could you?

A. Well, if the bell needed attention I would have to call on the day watchman to be up at the same time.

Q. During the two months or so when you were there as night watchman how often did you have occasion to call the other watchman up in case you had to go into the engine-room?

A. I don't remember of ever having to do that to help me with the engine; but when we would let go two anchors or in getting them up I would.

Q. You had sometimes to change the anchors during your watch at night, did you? A. Yes.

Q. Whenever you had to do that you would call him?

A. I would have to have the day watchman to help me.

Q. When did you change anchors?

A. If I had to use two anchors, when the weather was rough, when the tide turned I had to take up one of the anchors so it did not foul the other one.

Q. Did you make any change in the anchors on the night of the [25] collision before the collision

(Testimony of Robert Boyd Hemming, Jr.)

happened? A. No, not that I remember of.

Q. You are sure no change was made in your anchors that night?

A. I am quite certain, because the weather was quite calm.

Q. The changes in the tide did not make it necessary to make any change in your anchors?

A. No, we had only one anchor down.

Q. How far from the shore, do you think, the "Fullerton" was lying at anchor upon the evening of the collision?

A. Well, in my judgment it would be about a mile and a quarter or a mile and a half off of the Union Works dock.

Q. About a mile and a half?

A. Or a mile and a quarter.

Q. Off the Union Iron Works dock? A. Yes.

Q. That was the nearest point to the shore, was it, the Union Iron Works dock?

A. That was about—it was about as near as 16th street; they were about an equal distance.

Q. You would think, then, that you were from the shore at 16th street about a mile and a half away?

A. About that.

Q. How often did you take the bearings that you mentioned from Goat Island to Hunter's Point?

A. Well, if we had bad weather and it was blowing, I used to take a look at our bearings to see whether she had started to drift, or after a blow, if I changed anchors I would look to make sure she was in the same place.

(Testimony of Robert Boyd Hemming, Jr.)

Q. Were you instructed by the captain to see that she remained in the same place?

A. Yes, that was understood in keeping the watch, that is what we were keeping the watch for, the anchor watch.

Q. But the captain did not tell you that expressly to see to it that she remained in the same place, did he? [26]

A. No, because he understood that I knew enough to do so.

Q. That is your surmise; he did not say anything about that, did he, that you should look out that she remain in the same place?

A. At different times he told me that if the weather got rough to let go both anchors; he instructed me at different times about that that I remember of.

Q. How often did he come on board during those two months?

A. Well, he generally made it a rule to come on board every day except when his wife was sick; sometimes he stayed away for a day or two.

Q. When he came on board, do you know whether or not he took the bearings of the vessel?

A. I believe that he did; it is generally customary to do so.

Q. That is the captain's business, isn't it, to look out for the anchorage?

A. To look out for the ship in general; yes.

Q. And he did that about once a day, did he not?

A. Yes.

Mr. CAMPBELL.—Did what? Came aboard.

(Testimony of Robert Boyd Hemming, Jr.)

Mr. HENGSTLER.—Came aboard and saw whether or not the “Fullerton” had changed her position and took the bearing.

Q. How did you take these bearings—with an instrument, or just with your eye? A. Just by eye.

Q. Just by your eye? A. Yes.

Q. Are you practiced in that?

A. Getting the range?

Q. Yes.

A. I believe I could do very well at it.

Q. You mean that only approximately, don't you, from Goat Island to Hunter's Point, that you were about in a line between Goat Island and Hunter's Point—by that you mean approximately, don't you?

A. As near as you could see by your eye. [27]

Q. You don't mean to say exactly?

A. As near as you could see by your eye.

Q. Did you ever notice a change in the position of the “Fullerton” at any time when you were taking these bearings in the course of the two months?

A. A change in her position?

Q. Yes.

A. It was according to the setting of the tide; it would make a slight difference; you would make an allowance for that; if the wind happened to be blowing off the shore, you would be a little outside of the line, and if towards the shore, it would be inside of the line; but generally the vessel laid between those points.

Q. But she did drift, did she not, in the course of

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(Testimony of Robert Boyd Hemming, Jr.)

the two months?

A. Only what she would swing on the length of her chain; she did not change her bearings; that is, to be perceptible.

Q. That is not it; of course, I know that she swings according to the tide, and the location on the flood tide is different from the exact point where she is on the ebb tide; but apart from that, didn't she drift considerably during the two months when you were lying there at anchor?

A. She never dragged her anchors to my knowledge.

Q. Not to your knowledge? A. No.

Q. You are not sure whether she did or not?

A. I am quite certain, because she would have been out of the position where she always remained if she had dragged them to any extent.

(An adjournment was here taken until Monday, January 20, 1913, at 10 A. M.)

[Endorsed]: Filed May 12, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [28]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

Hon. F. S. DIETRICH, Judge.

No. 15,070.

SOUTHERN PACIFIC COMPANY, a Corporation,
Libelant,

vs.

Barkentine "FULLERTON," Her Tackle, Apparel
and Furniture,
Defendant.

Monday, January 20th, 1913.

Reporter's Transcript.

ROBERT BOYD HEMMING, Jr., cross-examination, resumed.

Mr. HENGSTLER.—Q. Mr. Hemming, what kind of a vessel is the "Fullerton"—iron or wooden?

A. A wooden vessel.

Q. A wooden vessel? A. Yes, sir.

Q. Now, I want to ask you to draw a diagram showing the position of the bell which you used on the "Fullerton" in relation to the place where you stood when you struck the bell. Will you draw it here as well as you can? A. Yes, sir.

Q. Will you please mark the place where the bell is "A"? A. Yes, sir (marking).

Q. It is attached here to the fore mast?

A. To the fore mast; that is the fore mast.

(Testimony of Robert Boyd Hemming, Jr.)

Q. Will you mark the place on deck at the fore mast "B"?

A. Yes, sir, that would be the deck below that.

Q. Just mark the place on the main deck where the fore mast [29] meets the deck "B"?

A. Yes, sir (marking).

Q. How long is the main deck? Draw that line through.

A. You cannot see the main deck through the bulwarks; there is a line through it.

Q. How high are the bulwarks above the deck?

A. Well, about three or four feet.

Q. About three or four feet? A. Yes, sir.

Q. That is the distance from the point "B" to the point "C" would be about three or four feet, would it? A. Yes, sir.

Q. How high is the bell from the point "B" or from the point "C," whichever you prefer to give us?

A. Well, I would just about be able to touch the bell by reaching my full height.

The COURT.—Q. From the deck?

A. Yes, sir.

Mr. HENGSTLER.—Q. That would be how high?

A. I could very near reach the bell.

Q. How tall are you, Mr. Hemming?

A. About five foot nine, or five foot ten.

Q. Would you say the bell is about six feet and a half above the main deck?

A. It is higher than that.

Q. Seven feet?

(Testimony of Robert Boyd Hemming, Jr.)

A. I could not say exactly; it is about that, as I remember.

Q. About seven feet?

A. In the neighborhood of seven.

Q. From the bell extended a rope? A. Yes, sir.

Q. What was that rope attached to, the end nearest to the bell?

A. It was attached to the clapper of the bell.

Q. It was attached to the clapper of the bell?

A. Yes, sir.

Q. What part of the clapper was it attached to, the upper or lower part?

A. The upper part; there is an eye in the lower part of the clapper which it was tied in.

Q. How heavy a rope was that?

A. A cord about as thick as my finger; I guess somewhere around three-eighths or one-half of an inch. [30]

Q. What was the distance from the point "C" to the break of the forecastle?

A. I should judge about eight feet.

Q. About eight feet?

A. Yes, sir, I should judge.

Q. Will you mark the point where the break of the forecastle meets the main deck, "D"?

A. Yes, sir, that is the most aft part of it.

Q. This is meant to be the aft part of the fore-castle?

A. That is the most aft extension of it.

Q. Mark that point "D"?

A. Yes, sir (marking).

(Testimony of Robert Boyd Hemming, Jr.)

Q. And mark the point of the forecastle above "D," mark it "E," the point where the break meets the forecastle-head. I do not want you to include the railing of the forecastle-head. This is the point, is it not, where the break of the forecastle-head meets with the forecastle? (Pointing.)

A. That is the most aft part of the forecastle-head. That is the deck of the forecastle-head.

Q. That is the point "E," is it not?

A. Yes, sir.

Q. Now, how high is the line D-E. How high is the forecastle-head above the main deck?

A. As near as I can remember, I could lap my finger by standing on that deck, but of course I could not pull anything off that high up.

Q. In other words, standing on the main deck you can just reach up to the forecastle-head?

A. Yes, sir.

Q. Therefore, the height of D-E is a little less than the height of B-A, is it not? A. Slightly less.

Q. About how much higher than the forecastle-head is the bell, "A"?

A. Well, as near as I remember it would be in the neighborhood of a foot.

Q. In the neighborhood of a foot? A. Yes, sir.

Q. Now, there is on the forecastle-head a railing, is there not? A. Yes, sir.

Q. On both sides of the forecastle-head?

A. Both sides and [31] across the back.

Q. And across the back? A. Yes, sir.

Q. How high is that railing?

(Testimony of Robert Boyd Hemming, Jr.)

A. About two foot six.

Q. Two foot six? A. Yes, sir.

Q. And to what part of that railing is the other end of the rope attached?

A. It was attached further forward than the aft extension. The aft extension of the forecastle-head covered the engine and the rope was led in here to about the second stanchion on the railing from the most aft part of the railing.

Q. On the port side or the starboard side?

A. Very close to amidships; this extension was amidships.

Q. I do not understand you. Did the railing run amidships?

A. There was an extension amidships from the forecastle-head.

Q. There was an extension amidships from the forecastle-head? A. Yes, sir.

Q. You could stand on that, could you?

A. I could walk out on that.

Q. And there was a railing on that extension?

A. Yes, sir, running around that extension.

Q. There was a railing running around that extension? A. Yes, sir.

Q. That railing was not amidships, was it. It ran across the vessel?

A. The port side of the extension was nearly amidships.

Q. The port side of the extension was nearly amidships? A. Yes, sir.

Q. Was it nearer to the port side of the vessel?

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(Testimony of Robert Boyd Hemming, Jr.)

A. Slightly to the starboard of the middle of the vessel.

Q. That extension of the forecastle-head was entirely on the starboard side of the forecastle-head, was it? A. On the starboard side amidships.

Q. On the starboard half of the forecastle?

A. Yes, sir.

Q. And the end of the rope was attached to the railing which [32] was on the extension?

A. Yes, sir.

Q. Where were the steps which led up from the main deck to the forecastle-head?

A. This set of steps went up between the extension of the forecastle-head and the bulwarks on the starboard side.

Q. They went up from the main deck, didn't they?

A. Yes, sir.

Q. You marked them here as going up from the bulwarks?

A. You cannot see them through the bulwarks here.

Q. Suppose you extend them down.

A. Right down to here, to "D," to the foot of the aft extension of the forecastle-head.

Q. The steps, therefore, are from "F" to "G" on the diagram? A. Yes, sir.

Q. Now, when you went on those steps, you went to the forecastle-head, you do not come out on the extension, but you come out on the forecastle-head itself, don't you, at the point "G"? When you get up on the forecastle-head you do not get out on the

(Testimony of Robert Boyd Hemming, Jr.)

extension but you get out on the fore-castle-head itself? A. At the corner of the extension.

Q. Then to get from that point where you reach the fore-castle-head to the point where the bell is, you have to walk back, you have to walk out on the extension?

A. A distance of about six feet to the aft part.

Q. In other words, the line "G"—"E" is six feet, is it not? A. About that.

Q. Now, the line "B"—"E," you said, was how long—the distance from the fore mast to the break of the fore-castle-head is how long?

A. In the neighborhood of eight feet.

Q. That is to the extension, is it not?

A. Yes, sir.

Q. And the height of the fore-castle-head above the main deck, if you can just reach it, would be about seven feet. You said you could just reach it?

A. I could just about put my fingers, [33] a part of my hand on the top.

Q. You think that would be about seven feet. You have said so? A. That is a close guess.

Q. Now, when you pull the rope, Mr. Hemming, you do not strike both sides of the bell with the clapper, do you? You only strike one side of the bell with the clapper?

A. Unless you should let the clapper fly back to hit the other side.

Q. Which way do you do? Do you let the clapper fly back or do you pull it one way?

A. By pulling it one way it makes the most noise

with the bell, which I did from the fore-castle-head.

Q. From the fore-castle-head you pull it one way and that gave one sound and then you pull it again and that gave another sound. That is the way you did? A. Every time you pull it it rang the bell.

Q. When you were standing on the main deck you reached up to the slack of that rope?

A. Yes, sir.

Q. And pulled it that way? A. Yes, sir.

Q. In that case how did the clapper strike, on one side or both sides? A. Just as you choose.

Q. Which way did you choose?

A. It would sound the hardest by pulling it one way. You would have to pull the arm too far to sound both sides and make it sound quickly.

Q. Before the collision you ran from the fore-castle-head down on the main deck and you go back as far as the mizzen rigging, did you not?

A. Yes, sir, I left the fore-castle-head just previous to the time of the collision.

Q. On which side of the vessel did you run back?

A. I came along the starboard side.

Q. On the starboard side? A. Yes, sir.

Q. That was the side on which the "Transit" was approaching you? A. Yes, sir.

Q. Was there anything in your way as you ran back? Did you have to go around any house or any structure on the ship? [34]

A. The deck was clear along the starboard side.

Q. Is there a kind of alleyway there?

A. Yes, sir.

(Testimony of Robert Boyd Hemming, Jr.)

Q. You ran along that, did you? A. Yes, sir.

Q. Was there anything in your way as you ran along that you had to get over?

A. Nothing that I remember of.

Mr. HENGSTLER.—That is all.

Redirect Examination.

Mr. CAMPBELL.—Q. Mr. Hemming, just one or two questions. Do you hold any license at the present time from the United States Government?

A. Yes, sir.

Q. What character of license?

A. I hold a license for operating motor vessels and an engineer's license for marine gas engines.

Q. You say a license for operating motor vessels?

A. Yes, sir.

Q. In what capacity?

A. Captain of motor vessels carrying passengers for hire and other work.

Q. What do you mean by motor vessels?

A. A vessel propelled by engines other than steam; electric and so forth.

Q. Some question has been made about your sea experience, and you said that you had been in the "Santa Paula." How large a vessel is the "Santa Paula" compared with the "Fullerton"?

A. She is a vessel about one-half the size or a little larger perhaps.

Q. What trade was she used in?

A. In the oil trade on the coast.

Q. Between what ports did she ply when you were in her?

48 *Mission Transportation & Refining Company*

(Testimony of Robert Boyd Hemming, Jr.)

Q. San Diego, San Pedro, Eureka, Portland, Astoria, Tacoma and Seattle.

Q. How long were you in her?

A. Four years and about a month.

Q. Where did the "Fullerton" ply during the period of your service in her?

A. To San Diego, San Pedro, Ventura, Port San Luis, San Francisco, Portland, and I believe Seattle and Honolulu.

Mr. CAMPBELL.—That is all. [35]

Recross-examination.

Mr. HENGSTLER.—Q. How large a vessel is the "Fullerton," Mr. Hemming?

A. She is 1400 and some odd—1492.

Q. Do you know her dimensions?

A. I believe she is 235 feet over all.

Q. 235 feet is her length? A. I believe so.

Q. You do not know the other dimensions, do you?

A. I have a remembrance that she has a 42 foot beam.

Q. And how wide?

A. 42 foot—41 or 42 feet wide.

Q. She is a very large vessel, is she not?

A. She is a medium sized sailing vessel.

Q. She has 4 masts? A. Four.

Q. Would you call a four-masted sailing vessel—would you call her a very large sailing vessel?

A. What is called a large sailing vessel is two or three times her size.

Q. Are there any larger sailing vessels here on the coast than the "Fullerton"?

(Testimony of Robert Boyd Hemming, Jr.)

A. In the coast trade, you mean?

Q. Yes, in the coast trade?

A. I don't say that I can name them just now.

Q. You do not know of any, do you? When you speak of a sailing vessel that is two or three times the size of the "Fullerton" what sailing vessel are you thinking of?

A. Vessels such as the Standard Oil Company have packing oil out to China.

Q. Mr. Hemming, how long have you had that license as a captain of motor boats?

A. I don't remember when I took that out.

The COURT.—Q. About?

A. About two years ago; I think.

Mr. HENGSTLER.—Q. About two years ago. You got it after this collision, didn't you?

A. Yes, sir, just after that.

Q. When you were in the "Santa Paula" you were there as donkeyman, weren't you—all the time you were in the "Santa Paula" you were running the donkey-engine? That was your duty, was it not?

[36]

A. Running the engine for the windlass and pump and electric lights and so forth.

Q. That is what they call the donkeyman, is it not?

A. In most vessels that would be classed the same as the donkeyman or pumpman.

Mr. CAMPBELL.—Just one question.

Q. Will you state whether or not the fore-castle-head deck is flush with the deck with the extension from the fore-castle-head?

(Testimony of Robert Boyd Hemming, Jr.)

A. That is flush. It is one and the same thing.

Q. The fore-castle-head deck stands back of the extension? A. Yes, sir.

Mr. HENGSTLER.—Q. From the rear part of it to the fore part of it it rises gradually, does it not?

A. Only with the sheer of the ship.

Q. There is a gradual rise towards the bow sprit?

A. Not more than the sheer of the ship.

Q. The sheer of the ship is of that kind that there is an elevation of the fore part of the fore-castle-head as compared with the aft part of the fore-castle-head?

A. There is a slight incline to it.

Mr. CAMPBELL.—Q. Was that incline sufficient to obstruct the range of the sound from this bell?

A. I don't believe it was. The bell could have as well been put here if I had.

Mr. HENGSTLER.—Q. You could not tell that for certain as to whether it obstructed it, or not. You never have actually watched that, have you?

A. It was apparent that vessels always heard the bell in foggy weather.

Q. I did not ask you that. That is all.

Mr. CAMPBELL.—Q. Just what was your rating in the "Fullerton." What were you called on board the "Fullerton"? A. Engineer.

Mr. HENGSTLER.—Q. That is rather unusual to be called an [37] engineer on a sailing vessel, is it not, Mr. Hemming?

A. They call the handy man the engineer, as a rule.

Mr. HENGSTLER.—That is all.

[**Testimony of John Olsson, for Claimant.**]

JOHN OLSSON, called for the claimant, sworn.

Mr. CAMPBELL.—Q. What vessel, if any, were you master of in September, 1909?

A. The tug "Restless."

Q. By whom was she owned?

A. She was owned by J. B. Spreckels & Brothers, but the Red Stack Towboat Company operated her at the time.

Q. What is the name of the Red Stack Towboat Company?

A. The Shipowners and Merchants' Towboat Company.

Q. Did you at any time during the month of September, 1909, anchor the barkentine "Fullerton" in the bay of San Francisco? A. Yes, sir, I did.

Q. Were you then acting in the capacity of master of this tug, the "Restless"? A. Yes, sir.

Q. Do you remember the date that you anchored her? A. No, sir, I do not.

Q. Do you know whether or not it was in the month of September?

A. Yes, sir; I believe it was in the month of September, 1909.

Q. How long had you been plying as a tugboat captain? A. At that time?

Q. Yes. A. Six or seven years.

Q. Were you familiar with the forbidden anchorages in San Francisco Bay? A. Yes, sir.

Q. Where did the most southern line of the forbidden anchorage extend?

(Testimony of John Olsson.)

A. It extended at the south of the 16th street wharf.

Q. To where?

A. To the light-house in Oakland Creek, or the entrance to Oakland Harbor.

Q. Alameda mole? A. Yes, sir. [38]

Q. Where with reference to the southern line of the forbidden anchorages did you anchor the "Ful-lerton"?

A. Oh, about, I should think—you mean the distance?

Q. Did you anchor it north or south of the southern end? A. South of the southern end.

Q. Anchoring south of the southern end will you state whether or not she was within the forbidden anchorage?

A. She was clear of the forbidden anchorage.

Q. How far, in your judgment, was she anchored south of the forbidden anchorage?

A. I should think where her anchor was dropped—it must be 3,500 feet from where her anchor was dropped. It might be between 1,500 and 2,000 feet.

Q. If she was anchored with 60 fathoms of cable out, could she swing in the forbidden anchorage in an ebb tide?

A. No, sir; she was not swinging in the forbidden anchorage.

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. HENGSTLER.—Q. Mr. Olsson, are you now

(Testimony of John Olsson.)

employed by the Tugboat Company, the Shipowners and Merchants' Tugboat Company?

A. No, sir.

Q. What is your business now?

A. I am master of the tug "Arabs," of the Pacific Mail Steamship Company.

Q. When were you first asked to come here and testify in this case?

A. Oh, it is about two years ago; a year and a half ago.

Q. A year and a half ago? A. Yes, sir.

Q. That was the year after the collision?

A. About that; yes.

Q. When you were in the employ of the tugboat company you anchored a good many vessels, didn't you? A. Yes, sir.

Q. In the course of that year? A. Yes, sir.

Q. Yet you are able to remember the exact circumstances of this particular anchoring?

A. Yes, sir, I am.

Q. Do you remember all the vessels that you anchored in the bay during the year 1909?

A. No, sir. [39]

Q. You do not remember all of them?

A. No, sir.

Q. You remember some of them, do you?

A. This particular case I do remember, because that morning afterwards there was a collision. It came to my mind then.

Q. It came to your mind then?

A. Through the collision that the "Fullerton" was

(Testimony of John Olsson.)

in with this ferry-boat.

Q. Who did you talk it over with at the time when it came in your mind?

A. I saw it in the paper, I guess; I don't know if I talked with anybody. I may have seen it in the paper.

Q. You saw it in the paper? A. Yes, sir.

Q. Then you remembered that you anchored the "Fullerton" 1,500 feet from the forbidden anchorage? A. Yes, sir, fully that.

Q. In that particular stop?

A. Yes, sir, well clear of the forbidden anchorage.

Q. Is the "Fullerton" the only vessel about which you have such a clear memory of all those you anchored in the bay of San Francisco?

A. I don't know; sometimes we have a way of remembering them by one thing and another. It is pretty hard to remember all of them in port.

Q. It would be very hard to remember when you do so much work?

A. Yes, sir, when the ship is anchored you forget all about it.

Q. You do not keep a written memorandum?

A. Yes, sir.

Q. Of the position where you anchored the vessel?

A. Not the position, just the time.

Q. Do you do that or does the office of the ship company do it?

A. The office of the Shipowners and Merchants' Towboat Company does it as well as the captain. We do not put the place where we anchor; sometimes we

(Testimony of John Olsson.)

would say about 16th, or about Folsom, or off Meiggs.

Q. Are you sure at the time when you anchored the "Fullerton" she was not anchored in the forbidden anchorage? [40]

A. Yes, sir, I am sure of that.

Q. You are sure of that?

A. That is in the Southern Pacific fairway. She may have been anchored close to the Western Pacific.

Q. How do you know that she was not in the Western Pacific fairway?

A. I do not know that it was established at the time.

Mr. CAMPBELL.—We think that that is immaterial.

A. It was not established at the time.

Mr. HENGSTLER.—How do you know it was not established at the time?

A. Because the Western Pacific had a car ferry running at the time over to the slip and the slip was not finished; they were working on the slip at the time, building it.

Q. When was the new anchorage zone established?

A. For the Western Pacific, you mean?

Q. Yes. A. I cannot exactly say.

Q. Do you know whether it was in September, 1909?

A. The first time I heard about it was when I was in the tugboat and they furnished us with a chart of the forbidden anchorage on a small scale.

the "Fullerton" was anchored? A. Yes, I am.

Q. And you are positive that it was after the time

(Testimony of John Olsson.)

Q. Are you sure of that?

A. About six months.

The COURT.—Why is this important?

Mr. HENGSTLER.—I am testing his memory. He has such a wonderful memory of these matters. As a matter of fact, the Western Pacific anchorage was established three days after the collision.

Mr. CAMPBELL.—This chart was issued in March, 1910.

The COURT.—You may proceed.

Mr. HENGSTLER.—It was, as a matter of fact, established three days afterwards. You can read that in the rules of the Harbor Commissioners. [41]

Mr. CAMPBELL.—We stipulated that this chart was not sent out by the board until March, 1910.

Mr. HENGSTLER.—You don't remember the date when the "Fullerton" was anchored?

A. No, sir.

[Testimony of Olaf Olson, for Claimant.]

OLAF OLSON, called for the claimant, sworn.

Mr. CAMPBELL.—Q. What is your present business, Mr. Olson?

A. I am in the Union Oil Company.

Q. On board what vessel? A. "Fullerton."

Q. Were you on board the "Fullerton" at the time she was in collision with the "Transit"?

A. Yes, sir.

Q. In what capacity were you employed on board?

A. Day watchman.

Q. What were your duties as day watchman?

(Testimony of Olaf Olson.)

A. To watch the ship and ring the bell in the fog.

Q. Did you have to do any work around the decks or anything of that sort?

A. Clean the deck and things like that; working around the ship in fine weather.

Q. Were you on board the "Fullerton" at the time of the collision? A. I was.

Q. Where were you?

A. I was turned in my bunk.

Q. Where was your bunk?

A. In the steerage aft.

Q. Where is the steerage aft, on what deck?

A. Right on the main deck.

Q. On the main deck? A. Yes, sir.

Q. On which side of the cabin?

A. Starboard side.

Q. Was there any window in the stateroom?

A. There was one.

Q. What do you call that? A. Port.

Q. Which side did that open out on?

A. The starboard side.

Q. Were you awake or asleep at the time of the collision? A. I had been shortly before.

Q. What was it that caused you to wake, if anything? A. The [42] "Transit's" whistle.

Q. Do you know whether or not the bell on board the "Fullerton" was ringing?

A. The bell on the "Fullerton" was ringing.

Q. Was ringing? A. Yes, sir, was ringing.

Q. What noise did you hear when you awakened?

(Testimony of Olaf Olson.)

A. The noise from the "Transit" paddle-wheels and the whistle.

Q. How often would you hear the bell of the "Fullerton's"?

A. The bell on the "Fullerton," about every minute was ringing.

Q. Did you see the "Transit" at all?

A. Seen her. I looked out through the port hole.

Q. What could you see of her?

A. Her range lights.

Q. Where did she look to be to you?

A. About three or four points on the bow.

Q. On the starboard bow?

A. The starboard bow.

Q. Of the "Fullerton"? A. Yes, sir.

Q. What way was she headed?

A. Broadside to the "Fullerton."

Q. What do you mean by broadside to the "Fullerton"?

A. Keeping on the course she was going she would have struck the main rigging.

Q. If the "Transit" kept on the course she was going she would have struck the "Fullerton's" main rigging? A. Yes, sir.

Q. What did you do after the collision?

A. I run up on deck and gave a hand to making the "Transit" fast; took the lines from her.

Q. Where was the "Transit" at the time you got on deck? A. She went across our bow.

Q. Are you positive, or is it merely a matter of guesswork that the "Fullerton's" bell was ringing in

(Testimony of Olaf Olson.)

that fog? A. The "Fullerton's" bell was ringing.

Q. Mr. Olson, do you know whether or not the "Fullerton" drifted to any extent after the collision?

A. No, sir, she did not drift. [43]

Q. She did not drift? A. No, sir.

Q. How do you know that?

A. Because we would have drifted up on the top of the shore.

Q. Did you do anything to tell as to whether or not she was drifting? A. Yes, sir.

Q. What was it? A. Put the lead over.

Q. Who, if anyone, assisted you in doing that?

A. Mr. Hemming.

Q. The older Mr. Hemming?

A. The older Mr. Hemming.

Q. What did you find when you put the lead over?

A. She was not dragging.

Cross-examination.

Mr. HENGSTLER.—Q. That is after the collision? A. Yes, sir.

Q. You were in your bunk, were you not, Mr. Olson, just before the collision? A. Yes, sir.

Q. What time did you retire? A. 9 o'clock.

Q. Had you been asleep after 9 o'clock?

A. I was laying reading in the bunk; just shortly before the collision I was going to sleep, I fell asleep.

Q. How long before the collision did you go to sleep?

A. I could not exactly—about half an hour.

Q. Where are your sleeping quarters—way in the stern of the vessel? A. In the stern.

(Testimony of Olaf Olson.)

Q. How large is that port through which you can see in your bunk?

A. A fellow can squeeze through, the average port.

Q. Is there a glass cover over the port that you can open and shut?

A. Yes, sir.

Q. Was that open that night?

A. No, sir, that was closed.

Q. You say you heard the bell of the "Fullerton" ringing that night?

A. Yes, sir.

Q. From what time on did you hear the bell ringing?

A. Well, the last time I was laying and reading in the bunk. [44] The fog was setting in, it was foggy and the next minute it was clear; you could see the lights on the shore.

Q. Did you see the lights from the shore?

A. Once in a while.

Q. From your bunk?

A. No, sir, I could not see from the bunk.

Q. From 9 o'clock on you heard the bell on the "Fullerton," did you?

A. Once in a while. Once in a while foggy and once in a while clear.

Q. Did you watch out to see whether it was foggy or whether it was clear?

A. I could hear that with the fog whistle.

Q. What fog whistles did you hear?

A. Goat Island.

Q. What island? A. Goat.

Q. You heard the Goat Island fog whistle from where you were?

A. Yes, sir.

(Testimony of Olaf Olson.)

Q. Did you hear any bells from shore?

A. On the other steamers.

Q. Did you hear any of the fog-bells that are along the shore on the slips for the steamers?

A. No, sir.

Q. You did not hear any of them? A. No, sir.

Q. Now, you are sure that the "Fullerton" did not drift after the collision? A. No, sir.

Q. I will read to you what the captain of the "Fullerton" testified to in that regard and I want to ask you whether he is correct, or whether you are correct. If the captain testified that she drifted—if the captain of the "Fullerton" testified that she drifted south afterwards and gave reasons for it he is mistaken, is he?

The COURT.—That is an argument with the witness.

Mr. HENGSTLER.—I am satisfied.

Q. You were the day watchman, were you?

A. The day watchman.

Q. You were supposed to look out for vessels approaching? A. Yes, sir.

Q. In the daytime? A. Yes, sir.

Q. Never in the night-time?

A. No, sir, except when I chose. [45]

Q. You are blind in one eye, are you, Mr. Olson?

A. Yes, sir.

Q. You were blind at that time in that eye?

A. I was.

Redirect Examination.

Mr. CAMPBELL.—Q. You can see an approach-

(Testimony of Olaf Olson.)

ing steamboat, can't you? A. Yes, sir.

Q. Was Mr. Hemming's father aboard that night, Mr. Olson? A. Yes, sir.

Q. Do you know whether or not he went to bed prior to the collision?

A. I could not tell that.

Q. Did you know where the southern end of the forbidden anchorage was?

A. 16th street dock; it extended from 16th street to Oakland somewheres.

Q. Do you know whether or not the "Fullerton" when she was lying at anchor at an ebb tide would be in the forbidden anchorage? A. No, sir.

Q. Would she, or would she not?

A. She would not according to Captain Grant.

Mr. HENGSTLER.—Q. That is all you know about it, that Captain Grant said so?

A. He was my boss in the daytime.

[**Testimony of Alexander G. McAdie, for Claimant.**]

ALEXANDER G. McADIE, called for the claimant, sworn.

Mr. CAMPBELL.—Q. Mr. McAdie, you are in charge of the weather bureau in San Francisco, of the Agriculture Department? A. Yes, sir.

Q. Have you with you the official records of the weather bureau for the months of November and December, 1909? A. Yes, sir.

Q. Is that an official record of your office?

A. That is an official record.

Q. I will ask you to turn to the date of November 13th, 1909, and read me the average wind velocity for

(Testimony of Alexander G. McAdie.)

the succeeding days up to and including December the 13th, 1909. [46] A. November 13th?

Q. From November 13th to December 13th?

A. November 13th, 1909, the average hourly velocity of the wind, nine miles and .8.

Q. Per hour?

A. Of the 24 hours; that is the average of the 24 hours.

The COURT.—Q. How is that average reached?

A. The velocity is recorded for every minute of the 24 hours continuous; then at the end of each hour the total number of miles that the wind has blown is added up; then the mean of the 24 hours is taken as the average daily.

The COURT.—Why would this be material?

Mr. CAMPBELL.—The witness has testified there was a prevailing southeast gale immediately after the collision which caused this vessel to drift down to the forbidden anchorage.

The COURT.—It is not necessary to go back as far as that. He says three or four days from this collision, but I think if you take it from December the first on it will be as far back as is necessary to show the average velocity of the wind.

Mr. HENGSTLER.—It would not be any different as long as the vessel drifted; she may have drifted in a day or two.

Mr. CAMPBELL.—We will show she would not drift in an ordinary wind.

The COURT.—The question was if the average would be material.

(Testimony of Alexander G. McAdie.)

Mr. CAMPBELL.—We will take the maximum with the day for the average.

The COURT.—Don't go further than the first; this happened on the 13th.

Mr. CAMPBELL.—Q. Will you give us the average daily velocities and the maximum of the 24 hours?

A. December the 1st, 1909, the average hourly velocity, 10 miles and .9. Do you wish its direction?

The COURT.—No, that is counsel simply asked for the average and maximum. [47]

A. (Contg.) December 2d, average hourly velocity 6.8, maximum 16 miles. December 3d, 5.2, maximum 13.

Mr. CAMPBELL.—Q. If you will just give us the hour of those maximum.

A. The time of the maximum was 12.18 P. M., December 3d.

Q. And the direction of the wind?

A. Northeast. December 4th, average 13.6, maximum 33, direction south, time 9:36 P. M. December 5th, average 5.7; maximum 15; direction northwest; time 11:56 A. M. December 6th, average 9.8; maximum 22; direction southeast; time 7.30 P. M. December 7th, average 8.7; maximum 20; direction southeast; 2:15 A. M. December 8th, average 13.2; maximum 33; direction southwest; time 10:37 A. M. December 9th, average 7.4; maximum 19; direction south; time 12:13 A. M. December 10th, average 3 miles; maximum 7; direction south; time 1:43 A. M. December 11th, average 3.9; maximum 8; direction

(Testimony of Alexander G. McAdie.)

east; time 12:35. December 12th, average 3.3; maximum, 9; direction northwest; time 3:01 P. M. December 13th, average 3.8; maximum 11; direction west; time 2:08 P. M. As I understand, that was the last date I was asked to give.

Q. What was the direction and the velocity between 11 and 12 P. M. on the 13th?

A. Between 11 and 12 P. M. on December 13th, 2 miles; from the north.

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. FOULDS.—Q. What was the velocity during those two hours on the night before; during the same two hours the night before?

A. You mean December 12th?

Q. Yes. A. Between 11 and 12?

Q. Yes. A. 3 miles, northwest.

[**Testimony of R. B. Hemming, Sr., for Claimant.**]

R. B. HEMMING, called for the claimant, sworn.

Mr. CAMPBELL.—Q. How old are you, Mr. Hemming? [48] A. About 61.

Q. Have you ever been to sea in your life?

A. Yes, sir.

Q. How many years?

A. Deep water about 12 years.

Q. And coastwise?

A. Pretty nearly all the remainder of the time with the exception of the few years I was ashore.

Q. How many years, all told, have you followed the sea?

(Testimony of R. B. Hemming, Sr.)

A. I have retired after a period that may be 35 or 38 years on the water.

Q. Were you on board the "Fullerton" the night of the collision with the "Transit"? A. Yes, sir.

Q. How did you happen to be there?

A. Well, I went aboard to talk over some family matters with my son. We had seen his mother and sister that day, but they monopolized the conversation. Then we had a launch, or he had a launch that he had been experimenting on for years, and I went to explain to him and ask him about carrying out some of his theories.

Q. How often did you see your son at that time?

A. I suppose that winter I saw him—I had maybe seen him four or five or six times during the winter.

Q. When you went aboard the "Fullerton" did you make any observation as to where she was anchored with respect to land bearings?

A. That is about the first thing I did; yes.

Q. How did you do that?

A. Well, I put a lead pencil on the compass to see what the bearing was.

Q. What bearing did you have of her?

A. From Hunter's Point and a little to the left and a little northward where that signal is on Goat Island. That would be about her north and south range.

Q. Did you know at that time what was the southern line of the forbidden anchorage?

A. Approximately; yes.

Q. Do you know whether or not she was anchored

(Testimony of R. B. Hemming, Sr.)

in such a position that she could swing into the forbidden anchorage?

A. She could not; she was a little to the south of 16th street wharf; that would cross the other course about right angles. [49]

Q. Step down to the chart here and indicate as to where in your judgment she was anchored.

A. Judging the line between here and here and about straight out from here crossing almost at right angles.

Q. Take a lead pencil and mark with the letter K.

A. Yes, sir (marking).

Q. Were you awake at the time of the collision?

A. Shortly before.

Q. Were you awake at the time of the collision?

A. Yes, sir.

Q. Where were you at the time of the collision?

A. At the time of the collision I was in my son's stateroom.

Q. On which side of the vessel was that?

A. Starboard.

Q. Which part of the vessel?

A. After starboard.

Q. What time had you gone into the stateroom?

A. About half-past 9.

Q. What did you do—what did you go in there for?

A. I went in there to turn in. It threatened foggy, that it might come in foggy, and I went below to take off my coat and vest. There was an electric light there and I fixed it so that I could read. I left my

(Testimony of R. B. Hemming, Sr.)

pants on and fixed my watch where I could see it.

Q. Did you go to sleep before the collision?

A. I doze off.

Q. What, if anything, awakened you?

A. I suppose this change in the sound. When I went to sleep I could hear the distant fog whistles, it seemed to me like Lime Point was blowing; then in the distance I could hear steamers' fog whistles. The general noise you hear when you drop off to sleep in such condition.

Q. About what time do you think that was?

A. When I went to sleep?

Q. Yes.

A. That is hard to say; I was kind of dozing. There was a kind of click. I remember dozing off with the book in my hand. [50]

Q. How long before the collision did you wake up from this click you speak of?

A. I woke up before the collision maybe five or seven minutes; something like that.

Q. Could you hear any bells or whistles?

A. I could hear the fog whistle coming closer and closer to us.

Q. Did you recognize the whistle?

A. I think I recognized it.

Q. What did you think it was?

A. I thought it was the "Transit's" whistle.

Q. Did you hear any bells ringing at that time?

A. Yes, sir.

Q. What bells? A. The "Fullerton's."

Q. Where was the bell on the "Fullerton" located?

(Testimony of R. B. Hemming, Sr.)

A. The ship's bell was forward on the fore mast.

Q. How was the "Fullerton's" bell ringing?

A. Quick raps; the fog whistle was about 15 raps to five seconds.

Q. Did you see the "Transit" before the collision?

A. No, sir.

Q. Did you see her lights before the collision?

A. No, sir; I did not look out the port hole.

Q. Until how long before the collision did the fog-bell of the "Fullerton" continue ringing?

A. The "Fullerton" seemed to be answering the blast of the steamer; I could not tell.

Q. What do you mean by that?

A. Well, if you are ringing a fog-bell and you hear a steamer close by every time she whistles you pull the bell, you kind of answer to make sure to satisfy her and yourself that she hears it so that she will go clear.

Q. Do you know whether or not, Mr. Hemming, the "Fullerton" dragged her anchor after the collision?

A. She did not drag it.

Q. Did you make any test to see whether she did or not? A. My son told me to put the line over.

Q. What did you do?

A. I put it over away from the ship. Mr. Olson gave me a sinker and I took that and knew from my experience in fishing that I could tell from that line whether she [51] was dragging.

Q. What did you find?

A. She was not dragging.

(Testimony of R. B. Hemming, Sr.)

Cross-examination.

Mr. HENGSTLER.—Q. Mr. Hemming, when did you take the bearings that you testified you took?

A. About half-past four.

Q. On the same day? A. Yes, sir.

Q. What day was that?

A. That was the 13th; the day that this controversy is about.

Q. The 13th of December? A. Yes, sir.

Q. About half-past four? A. About.

Q. What time did you go on board the “Fullerton”?

A. Just a few minutes before that time.

Q. Why did you take her bearings?

A. Second nature.

Q. Did you at that time think that there would be a controversy about the bearings? A. No, sir.

Q. Did the captain ever ask you to take the bearings of the vessel? A. No, sir.

Q. It was not your business to do so, was it?

A. Yes, sir, it was my business in a way. This is east, that is north, that is south and that is west (pointing). I always locate myself wherever I am; I guess it is my early training.

Q. You say you heard the bell of the “Fullerton”?

A. Yes, sir.

Q. From what time on was the bell rung?

A. I don't know when it commenced to ring.

Q. You don't know when you first heard it, do you?

A. It might have been eight minutes; it might have been five minutes before the collision that I first remember.

(Testimony of R. B. Hemming, Sr.)

Q. That was the first time that you heard the bell ring at all? A. That I remember.

Q. Of that whole ringing?

A. I don't think I heard it before.

Q. You didn't hear it while you were awake and reading?

A. No, sir, there was no fog then close by; there was no sound [52] around that would convince me there was any fog close by. I could hear fog whistles off in the distance.

Q. You say you have had experience at sea?

A. Yes, sir.

Q. Do you know how the bells should be rung in a fog, do you?

A. I know how they used to be in my time, yes.

Q. What is the way a fog-bell should be rung?

A. At least at one minute intervals at about five seconds; and ring the bell oftener if necessary.

Q. Is it rung by striking the clapper on both sides of the bell rapidly?

A. Some men do that, but generally it is just hit from one side; the same as you strike 8-6-4 (illustrating), you hit it one side.

Q. Is it not your experience that the universal way of striking the fog-bell is by hitting it on both sides?

A. I never saw it. It was never done that way.

Q. What was the diameter of the fog-bell, do you know, on the "Fullerton"?

A. It might be 10; it might be 18. I think it is larger than 18. I never investigated that closely.

Q. You heard it strike before the collision?

(Testimony of R. B. Hemming, Sr.)

A. Yes, sir.

Q. From the way it was struck can you tell now whether it was struck from one side of the bell or from both sides?

A. It sounded to me like it was struck from one side. There is a distinct sound if you strike it from one side (illustrating).

Q. The sounds would be more rapid if it was struck on both sides than if it was struck on the one side?

A. It depends on who was handling it, the length of the lanyard and the man who you have. A man that is on the end of a 18-inch lanyard, I don't see how he could very well make clear distinct sounds from both sides.

Q. The nearer you are to the bell and the shorter the rope the better the sound is, is it not?

A. Not if the bell is in this direction; you can strike it 6-8-10-15 if you hit it like you hook a button. [53]

Q. You admit if you hit it from one side there is more of an interval?

A. Not necessarily. Here is your bell and lanyard (indicating); you could hit that back 12 or 20 inches almost as clear, or as clear as you could with a six-inch lanyard.

Mr. HENGSTLER.—That is all.

[**Testimony of Frank Elwood Ferris, for Claimant.**]

FRANK ELWOOD FERRIS, called for the claimant, sworn.

Mr. CAMPBELL.—Q. What is your business?

A. Marine superintendent of the Union Oil Company.

Q. Do you hold a ship-master's license?

A. Yes, sir.

Q. Have you been in command of ships at sea?

A. Yes, sir.

Q. What vessels?

A. I was in command about seven years on the China coast from the time I was 21 years of age; then I came over here and I have been in command of the "Lansing" and "Argyll" on this coast.

Q. What character of ships are they?

A. They are oil carriers; the "Lansing" is about 6,000 tons.

Q. Were you marine superintendent of the Union Oil Company at the time of the collision between the "Fullerton" and the "Transit"? A. Yes, sir.

Q. How long had you been such?

A. I had been about 18 months in the employ at that time.

Q. Do you remember the anchoring of the "Fullerton" in the month of September, 1909?

A. Yes, sir.

Q. Who ordered her anchored? A. I did.

Q. Where did you direct that she be anchored?

A. Off the Union Iron Works well clear of the fairway.

(Testimony of Frank Elwood Ferris.)

Q. Where did the most southern edge of the fairway extend at that time?

A. From 16th street on the San Francisco side to Alameda mole.

Q. Did you ever see the "Fullerton" after she was anchored and up to the time of the collision?

A. I will not say every day, [54] but every other day. My duties take me to the Union Iron Works when we have ships in there for repairs, and which is nearly all the time, so that is the reason I wanted the "Fullerton" in a position and right off there so I could see how things were on the vessel from time to time.

Q. How many ships did the Union Oil Company operate?

A. With the ones we purchased we have about 21.

Q. You say you have ships in repair most of the time at the Union Iron Works?

A. It is very seldom that we do not have one vessel there.

Q. Where was the "Fullerton" anchored at the time, at the day previous to the collision, if you know? Locate it on the chart according to the best of your judgment.

A. Yes, sir.

Q. Mark it with a L.

A. Yes, sir (marking).

Mr. HENGSTLER.—Q. At the point marked L?

A. Yes, sir; practically that. I never really took any bearings. She was just directly off from the Union Iron Works.

Mr. CAMPBELL.—Q. Will you state whether or

(Testimony of Frank Elwood Ferris.)

not in that position she could swing into the forbidden anchorage? A. No, sir; she could not.

Q. Was any notice ever given by the State Board of Harbor Commissioners to change her anchorage up to December 13th, 1909?

A. Not up to December 13th.

Q. Where was she taken after the collision?

A. After the collision she was taken to the Union Iron Works for repairs. It was during that time, if I remember correctly, that we received instructions on the new forbidden anchorage.

Q. What size vessel is the "Fullerton"?

A. She is practically 1,500 tons gross.

Q. What length?

A. I am not quite sure of that; I think somewhere around 230 feet.

Q. What are the requirements as to the weight of anchors for a [55] vessel of the size of the "Fullerton"?

A. I could not answer that offhand, but I think in the neighborhood of 4,000 pounds.

Q. What size anchors, if any, does the "Fullerton" carry?

A. The "Fullerton" port anchor is something over 5,000 pounds and the starboard anchor is about 4,500 pounds.

Q. How do those anchors compare with the usual size of anchors on vessels the type and size of vessel of the "Fullerton"?

A. Her anchors are over size for that size of vessel.

Q. Any reason for having them so?

(Testimony of Frank Elwood Ferris.)

A. We have most anchors over sized on account of loading in a seaway in Port Harford. We load in a seaway and we need the anchors.

Q. What do you mean by a seaway in Port Harford?

A. In Port Harford you are right in the open sea; you are open right in the Pacific; there is simply a little breakwater.

Q. That is in the southern part of California?

A. Yes, sir, about 200 miles from here. The sea comes right in; it is simply the force of the Pacific coming right in, and the sea coming in is when we need our anchors.

Q. Do you ever load at that port without placing your anchors? A. Never.

Q. Where had the "Fullerton" been plying prior to the collision?

A. To the Islands and up and down the coast from Seattle to San Diego.

Q. Where was she loading for?

A. Port Harford.

Q. I will ask you to locate on the chart the sugar refinery. A. It is here (pointing).

Q. Mark it with the letter "S."

A. Yes, sir. (Marking.)

Q. I will ask you to locate upon the chart the Risdon Iron Works. A. Yes, sir. (Pointing.)

Q. Mark it with a capital "R."

A. Yes, sir. (Marking.)

Q. Locate on the chart the Union Iron Works and mark it with a "U."

(Testimony of Frank Elwood Ferris.)

A. Yes, sir, about here. (Marking.) [56]

Q. Captain, I will ask you this question: With the tide flowing in the wharves of San Francisco at a rate of six miles an hour, could a man in a rowboat row from a point which was northeast of the 16th street dock, could he by keeping his boat headed on a southwest course reach the 16th street dock?

A. Unless he had a very strong boat's crew he could not.

Q. What would be the effect of the tide upon that boat?

A. Well, unless he had a crew of say six men; even then with six oars he could go with the tide and then pull in, and he would land at some point according to the speed his boat had from his position,—that is, allowing for the effect of the tide. He simply could not go against the tide; he would have to pull and go with it and cross it.

Q. Is it possible for a man to row against a six-knot tide on a straight line?

A. No, sir, he could not; he would have to go with it.

Q. Captain, in your judgment, based upon your experience, I will ask you if the "Fullerton" with her port anchor down and 60 fathoms of cable could have drifted from the position where she was anchored into the fairway when the wind was blowing from the southwest at a maximum velocity of 33 miles per hour?

A. Well, I could answer that in another way.

Q. Would she?

(Testimony of Frank Elwood Ferris.)

A. Under some circumstances she might. It all depends upon the holding ground you are in. Now, 60 fathoms in some anchor grounds would not hold the vessel. We had considerable trouble after the collision in getting out the "Fullerton's" anchor. He had a very hard job; it seemed to be buried.

Q. What was the character of the holding ground?

A. I do not know exactly but I think it is soft mud.

Q. Were there any other vessels anchored there at the time of the collision?

A. Yes, sir; the "Lansing" was about 150 feet from the "Fullerton" and the "Ventura" was anchored there. [57] There were two or three vessels anchored there as well as the "Lansing" and "Ventura."

Q. What was the popular anchorage for vessels entering at that time in San Francisco bay?

A. Until the change, just off the Union Iron Works. That is where we laid all our vessels up.

Mr. CAMPBELL—That is all.

Mr. CAMPBELL.—That is my case, with the exception of the captain's deposition, which may go in. I will offer it in evidence.

Mr. HENGSTLER.—The captain's deposition was taken by you. I suppose it is in evidence.

Mr. CAMPBELL.—I just said I will offer it in evidence.

The COURT.—Have you anything further?

Mr. FOULDS.—We will offer in evidence this chart as Libellant's Exhibit No. 1.

(The chart is marked "Libellant's Exhibit No. 1.")

[**Testimony of W. H. Higginson, for Libelant
(in Rebuttal.)**]

W. H. HIGGINSON, called for the libelant in rebuttal, sworn.

Mr. FOULDS.—Q. Captain, does the steamer “Transit” have steerage-way under less than half speed?

A. Less than half speed she would lose her helm very slightly, but not to control her.

Q. Answer this question, Captain. In guiding your course across the bay in the fog that night what sound did you use to give you your bearings?

A. Only the compass.

Q. Did you rely upon anything else?

A. Nothing else. There is no sound to be used in a dense fog, only the compass.

Q. You had the lookouts of course on the bow?

A. Yes, sir.

Q. And they were listening? A. Yes, sir.

Q. And were you governed by the sound?

A. Governed by any sound I could hear; yes.

[58]

Q. You testified, didn't you, that you knew where the “Fullerton” was the day before?

A. Yes, sir; I knew the bearings from the slip.

Q. Counsel for the claimant in this case asked you whether after the hearing of the bell of the slip you felt any apprehension when you failed to hear the bell of the “Fullerton.”

Mr. CAMPBELL.—Are you going to try your case over again?

(Testimony of W. H. Higginson.)

Mr. FOULDS.—I thought there was a little misunderstanding.

Mr. CAMPBELL.—I think the record is clear.

The COURT.—I think so.

A. Shall I answer?

Mr. FOULDS.—Q. Yes.

A. Not hearing the bell of the "Fullerton," I thought my course was right.

The COURT.—I think the record is clear enough.

Cross-examination.

Mr. CAMPBELL.—Q. What is the lowest speed of the "Transit" under which she will maintain speedway?

A. I think she will maintain speedway steering her at half speed.

Q. Give me the speed in miles.

A. Seven miles.

Q. What is the regular speed?

A. Full speed fair weather she will go 11 knots.

Q. When you are speaking of her all the time you are speaking of knots? A. Yes, sir.

Q. You are always speaking of knots?

A. Yes, sir.

Q. You mean to say that the slowest speed that you can keep steerage-way is about seven knots?

A. The lowest speed is about seven knots.

Q. I am asking you about the lowest speed you can keep steerage-way?

A. I have never found out going on the reversed bell.

Q. As a matter of fact, can't you maintain

(Testimony of W. H. Higginson.)

steerage-way at three knots? A. No, sir.

Q. Why not? A. On account of one rudder.
[59]

Q. What does she need, more rudders?

A. One rudder is sufficient. I have been running over 35 years at that average speed.

Q. Don't you think she would maintain steerage-way at four knots?

A. No, sir; but as I said before, I do not know the exact amount of knots. I know when she is going slow and we do not keep a log as you do in deep water ships; we run there under slow or fast bell.

Q. You cannot tell me in knots how slow that vessel can go and still maintain steerage-way?

A. No, sir.

Q. I want you to locate for me on this chart the dock from where you depart on the Oakland side.

A. Right there (pointing). We start from this dock.

Q. I thought you told me the other day you departed from the Long Wharf. A. No, sir.

Q. Mark it with a capital "O."

A. Yes, sir. (Marking.)

Q. Where would a southwest by south course bring you up on the San Francisco shore?

A. It would bring me up to my slip on a flood tide.

Q. If there was no tide at all where would a southwest course bring you on the San Francisco shore?

A. About Mission Rock.

Q. Where would a southwest half south bring you?

A. Without any tide?

(Testimony of W. H. Higginson.)

Q. Yes.

A. It would bring me right in between Mission Rock to about there (pointing); between Mission Rock and Hunter's Point.

Q. When the tide was running three knots an hour where would a southwest by south course bring you?

A. In clear weather we make allowances.

Q. Answer my question.

Mr. HENGSTLER.—He is.

A. You are bringing me down to a very fine line on a proposition with a big heavy boat. We figure a great deal on the strength of the tide when we run. If the tide is running very strong we [60] keep up a little here.

Q. Then the allowances you make would depend upon the character of tide? A. Yes, sir.

Q. When you run in the fog you have that uncertainty?

A. In fog you cannot make very fine calculations. It is according to how the tide is.

Mr. CAMPBELL.—That is all.

Mr. CAMPBELL.—I take it, it is not necessary to read that deposition.

The COURT.—No.

(Testimony closed.)

[Endorsed]: Filed May 20, 1913. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [61]

**[Certificate of Clerk U. S. District Court to
Supplemental Apostles on Appeal.]**

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of Cali-

fornia, do hereby certify the foregoing and hereunto annexed sixty-one pages, numbered from 1 to 61, inclusive, contain a full, true and correct Transcript of the Testimony of various witnesses taken at the trial, and not included in the original transcript on appeal, in the cause entitled Southern Pacific Company, a corporation vs. Barkentine "Fullerton," No. 15,070, as the same now appears on file and of record in the said District Court, Division No. 1, and which is now made up in accordance with the instructions of Messrs. Ira A. Campbell, McCutchen, Olney and Willard, proctors for appellants herein.

I further certify that the costs of preparing and certifying the foregoing Transcript of Testimony is the sum of Thirty-six Dollars and Seventy Cents (\$36.70), and that the same has been paid to me by proctors for appellants herein.

In witness whereof, I have hereunto set my hand and the seal of said District Court this 31st day of May, A. D. 1913.

[Seal]

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy. [62]

84 *Mission Transportation & Refining Company*

[Endorsed]: No. 2262. United States Circuit Court of Appeals for the Ninth Circuit. Mission Transportation and Refining Company, a Corporation, Claimant of the Barkentine "Fullerton," etc., Appellant, vs. Southern Pacific Company, a Corporation, Appellee. Supplemental Apostles on Appeal. Additional Testimony. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed May 31, 1913.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2262

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MISSION TRANSPORTATION AND REFIN-
ING COMPANY (a corporation), claimant of
the Barkentine "Fullerton", etc.,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY
(a corporation),

Appellee.

BRIEF FOR APPELLANT.

Statement of the Case.

On the 13th day of December, 1909, at about 11:30 p. m., in a dense fog, the car ferry "Transit", operated by respondent (libelant below) and cross-appellant, collided with the barkentine "Fullerton", belonging to appellant (cross-libelant below). At the time of the collision the "Fullerton" was anchored within a permitted anchorage zone, south of Mission Bay slip in San Francisco harbor, and the "Transit" was on one

of her regular trips, with a load of freight cars, from Oakland Mole to Mission Bay.

The "Fullerton" had been anchored in her then position during the month of September, preceding, and had there remained up to the time of the collision. The "Transit" was one of the Southern Pacific Company's regular freight car ferries traversing San Francisco Bay between Oakland and San Francisco, and had passed the "Fullerton" on three or four, and sometimes more, trips per day during the period of her anchorage. The "Fullerton" was displaying the regulation anchor light, and was at all times maintaining a proper lookout, who, during the prevalence of the fog, diligently sounded the fog bell as required by law of anchored vessels.

Prior to the collision, and during the same evening and night, the "Transit" had left the Oakland side at 5:43 p. m. and arrived at the Mission Bay slip at 6:27. She left the slip again at 7:14, arriving at Oakland Mole at 7:52, and departed again for Mission Bay at 8:01, reaching the latter at 8:40 p. m. She returned to Oakland at 9:30, arriving there at 10:24 and left again at 10:53, and on the return trip at about 11:25 p. m. ran into the "Fullerton". No fog prevailed during the earlier trips of the evening, but set in shortly after the "Transit" last departed from Oakland. A fog bell was maintained on the Mission Bay slip, and the master of the "Transit" claims to have heard this 22 or 23 minutes after leaving Oakland. He denies, however, having heard the "Fullerton's" fog bell, and

asserts that his first intimation of being in proximity to the "Fullerton" was the report of her light by the lookout, which, upon his looking up from the compass, was immediately seen by him bearing on the "Transit's" port bow, over the jackstaff located at the forward port corner of the "Transit's" main deck. The master during the entire trip was inside of the pilot house, himself steering the "Transit", and watching her compass, and upon looking up and seeing the "Fullerton's" light, he rang the jingle bell to go full speed ahead on her engines, and put the helm hard aport in an effort to cross the "Fullerton's" bow. He then looked up again, and seeing there was no chance to avoid the "Fullerton", and, at the same time, hearing her first officer, who was also in the pilot house, say "stop her, Captain," rang the stop bell, and "landed right across her ('Fullerton's') bow".

The "Transit" was making about seven knots at the time the light of the "Fullerton" came into view, and though lookouts were being maintained forward on the main deck below, there was no navigating officer outside of the pilot house.

A libel was thereafter filed by respondent against the "Fullerton", and a cross-libel, in turn, filed by appellant against the Southern Pacific Company. The cause came on for trial on January 17, 1913, before the Honorable Frank S. Dietrich, sitting as judge of the United States District Court for the Northern District of California. Upon the conclusion of the trial, Judge Dietrich rendered his decision, holding that

the collision was due to an inevitable accident, and, if not that, to an inscrutable fault. Thereafter this appeal and cross-appeal were prosecuted.

Specifications of Error.

Errors have been assigned, in the Apostles on Appeal, to the decree of the District Court dismissing the cross-libel of appellant.

The assignments of error will be discussed, for convenience, under the following specifications:

I.

The court erred in not holding that the "Transit" had not overcome the presumption of fault resting against her as the moving vessel.

II.

The court erred in not holding that the "Transit" was at fault for proceeding in the fog at an excessive speed.

III.

The court erred in not holding that the "Transit" was at fault for not stopping her engines when first hearing forward of her beam the fog bell of the "Fullerton", and then navigating with caution, as required by the second paragraph of Rule 16 of the Inland Rules of Navigation.

IV.

The court erred in not holding that the "Transit" was negligently navigated in that she did not stop and reverse her engine on first seeing the "Fullerton's" light.

V.

The court erred in not holding that the "Transit" was negligently navigated in that

(a) Her master was in the pilot house, engaged in steering her, instead of devoting his exclusive attention to the duties of master in her navigation; and

(b) No navigating officer was stationed on the bridge outside of the pilot-house.

VI.

The court erred in holding that the collision was due to inevitable accident or inscrutable fault.

Argument.

I.

PRESUMPTION OF FAULT AGAINST THE "TRANSIT".

The "Fullerton" was at anchor, as she had been since the preceding September. Supp. Apostles, pp. 6, 51.) She was anchored by the tug "Restless", operated by the Shipowners & Merchants Tugboat Company, south of the southernmost line of the forbidden anchorage zone, extending from 16th street wharf

in San Francisco to the Alameda Mole. (Supp. Apostles, pp. 51-52; Apostles, pp. 56-57, 140-141.) The charts introduced as exhibits show a present forbidden anchorage south of the then forbidden zone, but, to avoid confusion in the use of the charts, it was stipulated that the southernmost boundaries of the forbidden anchorage at the time of the collision was the line from the end of the 16th street wharf to the Southern Pacific Mole, being the line marked "A-B" on claimant's exhibit 1. (Apostles, pp. 44-45.) She was thus, at the time of the collision, properly anchored in waters specially set aside for anchorage purposes. Her presence must have been known to the master of the "Transit" from the date of her anchorage, though he would only frankly admit knowledge of it for about three days previous to the collision. (Apostles, pp. 59-61, 70; Supp. Apostles, p. 79.) Be that as it may, there is no evidence of his having made any complaint that she was within the forbidden anchorage, and the master of the "Transit" confessed to knowledge of her position, not from the fact of having necessarily passed her *four* times on the day and night of the collision, but admittedly from similar passing of her on three or four trips a day for at least the two preceding days. (Apostles, pp. 59-61, 70, 81; Supp. Apostles, p. 79.)

Certain it is, then, that the "Transit" collided with a vessel anchored in permitted waters, the position of which was known to the former. Under these circumstances, *the burden of proof was upon the "Transit" to exonerate herself from liability.*

This rule is so well established in the law of collisions that it requires no extended citation of authority. It was stated as follows by the Supreme Court of the United States in

The Virginia Ehrman, 97 U. S. 309; 24 L. ed. 890, 892:

“Vessels in motion are required to keep out of the way of a vessel at anchor, if the latter is without fault, unless it appears that the collision was the result of inevitable accident; the rule being that the vessel in motion must exonerate herself from blame, by showing that it was not in her power to prevent the collision by adopting any practicable precautions.”

The rule not only imposed upon the “Transit” the burden of exonerating herself, but raised a presumption of fault against her.

The Oregon, 158 U. S. 186; 39 L. ed. 943.

In that case the steamship “Oregon” ran down, on a clear night, the bark “Clan Mackenzie”, anchored on the west shore of the Columbia River. In holding the “Oregon” solely at fault, Mr. Justice Brown, writing the opinion, stated the principles of law governing collisions between moving and anchored vessels, as follows:

“The circumstances above detailed raise a presumption of fault on the part of the Oregon, and the burden of proof is upon her to exonerate herself from liability. * * * As we had occasion to remark in *Alexandre v. Macham*, 147 U. S. 85 (37:90), where one vessel clearly shown to have been guilty of a fault, adequate in itself to account for the collision, seeks to impugn the man-

agement of the other vessel, there is a presumption in favor of the latter, which can only be rebutted by clear proof of a contributing fault. *This principle is peculiarly applicable to the case of a vessel at anchor, since there is not only a presumption in her favor, by the fact of her being at anchor, but a presumption of fault on the part of the other vessel, which shifts the burden of proof upon the latter.*" (Italics ours.)

The Clara Clarita, 23 Wall. 1, 23 L. ed. 146;

Rich v. Hamburg-American Packet Co., 117 Fed. 751;

The Lucille, 169 Fed. 719.

This court applied the rule in

The Europe, 190 Fed. 475,

affirming Judge Wolverton, who stated the rule and its reasons in the following language:

"It is a rule that a moving vessel must keep out of the way of one at anchor. This because the one at anchor is practically helpless, and is usually so conditioned as to be unable to relieve herself readily in stress of emergency. The rule is applied with great strictness, the vessel at anchor being in a proper place. In such case *the presumption of fault lies against the vessel in motion.*" (Italics ours.) 175 Fed. 596.

A case peculiarly in point because of its being a collision in a fog between the ferry "D. S. Gregory" and the steamship "Talisman", anchored near the course of the ferry, of which fact those in charge of the navigation of the ferry had knowledge, was that of

The D. S. Gregory, Fed. Cas. 4102.

In holding the ferry solely at fault, Circuit Judge Nelson said:

“It was the duty of the D. S. Gregory to take every reasonable precaution in her power to avoid the Talisman. In this, I think, she failed. She knew that the Talisman was anchored in her track the afternoon or evening before; and, as the Talisman did not change her position, down to the time of the collision, and the ferry boat was passing her every trip she was making, the ferry boat is chargeable with notice of her position, and should have been so navigated as to avoid her. Decree below affirmed.”

The same court, in

The Bedford, Fed. Cas. 1216,

held a ferry at fault for colliding with a schooner, knowledge of the anchorage of which was held by the ferry boat's officers, who had previously warned the schooner to move. The latter was also held liable for anchoring within forbidden grounds. This fact, not present in the case at bar, makes the rule none the less applicable to the “Transit”. Of the ferry's fault, Circuit Judge Nelson remarked:

“I think that the ferry boat, also, was in fault, in not avoiding the schooner, as the pilot knew her position, and that the mate had refused to change his location. I cannot but think that if greater precaution had been used, the collision need not have occurred, notwithstanding the density of the fog.”

The decision in

The Gregory, supra,

was later followed by Judge Brown, of the Southern District of New York, and, on appeal, by Judge Wallace, in the Circuit Court, in

The Rockaway, 19 Fed. 449; 25 Fed. 775.

There, a ferry boat was in collision during a snow squall with a brig anchored in usual anchorage grounds near the course of the ferry, the position of the brig being known to the ferry. In holding the ferry solely at fault, Judge Wallace said:

“As the pilot of the ferry boat had been making trips every few minutes for several hours prior to the collision, passing the brig on each trip, he had notice of her location. It cannot be doubted that under such circumstances it was incumbent upon the steamboat to exonerate herself from fault by satisfactory proof of exculpating circumstances,—some extraordinary or unusual occurrence which nautical men could not anticipate or prevent by the exercise of all reasonable precautions.”

Possessed of full knowledge of the anchorage of the “Fullerton”, the “Transit” has not only failed to exonerate herself from the presumption of fault thus imposed upon her, but the record affirmatively shows the most culpable negligence in her navigation. She was running at an excessive rate of speed in a dense fog, a speed at which she could not be stopped in less than 800 feet, though the fog was so dense the master could only see the “Fullerton” 100 feet, and a speed at which her engines could not be immediately reversed.

Upon being apprised of the proximity of the "Fullerton", the "Transit's" engines were put at full speed ahead, and then stopped the moment she was upon the "Fullerton", instead of being immediately reversed. Her master, who was controlling her navigation and giving all signals to the engine room, was busily engaged in the pilot house steering the vessel, with his eyes fixed upon the compass, instead of having his undivided attention centered upon the navigation of his vessel through the fog as he approached the wharves of San Francisco and known anchorage of vessels. Any one of the faults were sufficient to involve the "Transit", let alone the presence of all of them. To say the least, it was flagrant navigation of a large and unwieldy vessel, in the crowded and fog-ridden waters of San Francisco Bay, which merits the severest condemnation.

II.

THE "TRANSIT'S" SPEED WAS EXCESSIVE.

A. *The "Transit's" Speed Per Se Excessive.*

At the opening of the case, on direct examination, the master of the "Transit" admitted a speed in the fog that has been condemned as excessive by the Supreme Court in at least four leading cases, to say nothing of the numerous decisions of the District Court and Circuit Courts of Appeal.

He testified as follows:

“Mr. HENGSTLER:

Q. You left the Oakland slip at 10:53?

A. Yes.

Q. In the night time?

A. Yes.

Q. What was the destination of the steamer at that time?

A. Mission Bay slip, 16th Street.

Q. *How was the weather?*

A. Dense fog.

Q. Under what speed did the steamer “Transit” proceed on the trip across the bay?

A. Well, she was under a slow bell, that is, as close as we could shut her off without losing steerage-way. *I should say perhaps seven miles an hour; perhaps a little more, or perhaps a little less.* (Apostles, p. 47.) (Italics ours.)

The speed thus confessed was early held to be excessive by the Supreme Court in

The Pennsylvania, 19 Wall. 125; 22 L. ed. 148, where a collision took place upon the high seas between a steamship and a sailing vessel. If the court had been passing judgment upon the “Transit’s” speed, the opinion could not have more pertinently pointed out wherein such a speed was too high for the “Transit” in the harbor of San Francisco, under conditions where the master knew that not only moving, but anchored vessels were to be met in the fog. Of the “Pennsylvania’s” speed Mr. Justice Strong said:

“Our rules of navigation, as well as the British rules, require every steamship, when in a fog, ‘to go at a moderate speed’. What is such speed may not be precisely definable. It must depend upon

the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others. But the purpose of the requirement being to guard against danger of collisions, very plainly the speed should be reduced as the risk of meeting vessels is increased. In the case of 'The Europa,' Jenkins, Rule of the Road at Sea 52, it was said by the Privy Council: 'This may be safely laid down as a rule on all occasions, fog or clear, light or dark, that no steamer has a right to navigate at such a rate that it is impossible for her to prevent damage, taking all precaution at the moment she sees danger to be possible, and if she cannot do that without going less than five knots an hour, then she is bound to go at less than five knots an hour.' We do not think the evidence shows any necessity for such a rate of speed as the steamer maintained. It is true her master, while admitting she was going seven knots, states that he don't consider she could have been steered going slower—could not have been steered straight. And two other witnesses testify that, in their opinion, she could not have been navigated with safety and kept under command at a less rate of speed than seven miles an hour. These, however, are but expressions of opinions based upon no facts. They are of little worth. And even if it were true that such a rate was necessary for safe steerage, it would not justify driving the steamer through so dense a fog along a route so much frequented, and when the probability of encountering other vessels was so great. It would rather have been her duty to lay to. * * * We think, therefore, it must be concluded that the steamer was going at an undue rate of speed, and that it was her fault that she came into a position from which she could not, or certainly did not, escape without colliding with the bark."

Later, in

The Nacoochee, 137 U. S. 330; 34 L. ed. 687, 690, the Supreme Court condemned the steamship "Nacoochee" for a collision on the high seas with a sailing vessel, where the steamer was proceeding in a fog at a rate of seven knots per hour. Of the duty resting on the steamship to moderate her speed, Mr. Justice Blatchford remarked:

"She was bound, therefore, to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog."

A speed of six knots an hour was likewise held excessive by the Supreme Court in

The Martello, 153 U. S. 64; 38 L. ed. 637, 640, where the steamship "Martello", as she was leaving the port of New York, collided with a sailing vessel. In holding the "Martello" at fault, Mr. Justice Brown, writing the opinion of the court, said:

"By the finding of the Circuit Court that, at the time the horn of the barkentine was heard upon the steamer, the latter was proceeding at a speed of from five and a half to six knots an hour, we are relieved from the necessity of examining the somewhat conflicting testimony upon the question of the steamer's speed. While it is possible that a speed of six miles an hour, even in a dense fog, may not be excessive upon the open ocean and off the frequented paths of commerce, a different rule applies to a steamer just emerging from the harbor of the largest port on the Atlantic coast, and in a

neighborhood where she is likely to meet vessels approaching the harbor from at least a dozen points of the compass. Under such circumstances, and in such a fog that vessels could not be seen more than a quarter of a mile away, it is not unreasonable to require that she reduce her speed to the lowest point consistent with a good steerage way, which the court finds in this case to be three miles an hour.”

If a speed of six knots was thus to be condemned as immoderate for a steamship emerging from New York harbor on to the high seas, how much less can it be justified in the case of the “Transit”, crossing from Oakland to San Francisco through waters in which vessels in great number are constantly passing, and particularly in approaching the wharves of San Francisco in the vicinity of vessels known to be at anchor?

The Supreme Court, however, is not alone in condemning a speed of seven knots under such circumstances, but the reports are replete with similar rulings by the lower courts, citation of a few of which will suffice to show the general disapprobation with which such speeds in fogs have met.

The Eleanor, Fed. Cas. 4335;

The Manistee, Fed. Cas. 9028;

The Pottsville, 12 Fed. 631;

The Lepanto, 21 Fed. 651;

McCabe v. Old Dominion S. S. Co., 31 Fed. 234;

The Catalonia, 43 Fed. 396;

Pennell et al. v. U. S., 162 Fed. 64.

No evidence was introduced which would support any reason for removing the "Transit" without the operation of the rule which has been so rigidly applied to cases less deserving. Consider for a moment that the "Transit" was traveling, in a fog so dense that her officers could not see more than 150 feet, towards vessels she knew to be at anchor in the harbor, headed directly for the wharves to and from which vessels were always moving, and certainly we have a situation more pregnant with the probabilities of collision than on the open waters of the high seas, or even at the entrance to New York harbor. If the Supreme Court was right in holding seven knots to be excessive under the latter conditions, it necessarily follows that the District Court erred in its failure to condemn the "Transit" for a like speed in San Francisco harbor.

B. *The "Transit's" speed was excessive in that she could not be stopped before striking the "Fullerton" after coming in sight of her in the fog.*

Even if the admitted speed of seven knots was not *per se* excessive, the "Transit's" speed was certainly immoderate when tested by the principles upon which rest all of the decisions condemning speeds in fog. This underlying principle was succinctly stated as follows by Mr. Justice Brown in

The Chattahoochee, 173 U. S. 540; 43 L. ed. 801, 805:

"No absolute rule can be extracted from these cases. So much depends upon the density of fog

and the chance of meeting other vessels in the neighborhood, that it is impossible to say what ought to be considered moderate speed under all circumstances. It has been said by this court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight provided such approaching vessel is herself going at the moderate speed required by law."

It is the same principle, stated in slightly different words, as that on which the "*Nacoochee*", *supra*, was condemned. We again quote Mr. Justice Blatchford on the rule:

"She was bound, therefore, to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel, which she should see through the fog."

In that case, the colliding vessels were under way, a fact which in no way lessens the application of the rule to moving vessels in collision with those at anchor. For its violation, the S. S. "Northern Queen" was held at fault for colliding with the Whaleback "Sagamore" at anchor in a fog in St. Mary's River, Judge Hazel saying:

"It was held in *The Chattahoochee*, 173 U. S. 548; 19 Sup. Ct. 491, 43 L. ed. 801, that 'moderate speed' consists in such a rate as will enable a steamer to stop in time to avoid collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. The *Sagamore* being at

anchor, the principle enunciated in this case would require the Northern Queen to proceed at such a moderate rate of speed as would have prevented the collision by proper management, after the Sagamore came in view, unless circumstances existed which made it dangerous for her to proceed at moderate speed. *The Pennsylvania*, 19 Wall, 125; 22 L. ed. 148; *The Colorado*, 91 U. S. 692; 23 L. ed. 379; *The Batavia*, 40 Eng. Law & Eq. 19; *The Nacoochee*, 137 U. S. 330; 11 Sup. Ct. 122; 34 L. ed. 687. This rule is well settled, and, where properly applied, has been reaffirmed and followed.”

The Northern Queen, 117 Fed. 906, 911.

In

The Kentucky, 148 Fed. 500,

the rule was invoked to condemn the “Kentucky” for colliding with the “Exeter City” which was stopped and engaged in discharging her pilot at the entrance to Gedney Channel, New York harbor. Though her speed was between five and seven knots, the “Kentucky” was held solely at fault, the court saying:

“It is admitted that she was then going at the rate of three or four knots but was probably going considerable in excess of five knots at the time. In any event, she was clearly violating the rule that steamers navigating in a fog are bound to reduce their speed to such rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such an approaching vessel is herself going at the moderate speed required by law. *The Chattahoochee*, 173 U. S. 540, 548; 19 Sup. Ct. 491; 43 L. ed. 801. As the *Exeter City* here was practically not moving, the latter part of the rule need not be considered and this proves to be a case where the implicated ves-

sel was going at such a rate that she could not bring herself to stop before striking a motionless vessel. The Kentucky was clearly in fault, and the only real question in the case is whether the Exeter City was also in fault.”

The Circuit Court of Appeals for the Second Circuit, in

The Etruria, 147 Fed 216,

held the “Etruria” in violation of the rule, when she collided with a lighter lying stationary in New York harbor, Circuit Judge Wallace remarking:

“If, owing to the state of the fog, the lighters could not have been discovered by vigilant observation until the Etruria was within 750 or 1000 feet of them, it is plain that the Etruria was maintaining too great speed. The fact that in making the changes of course her wheel was put hard over, suggests that she was going at a higher speed than she asserts. However that fact may have been, her speed was excessive if it was true that she could not reverse her engines and come to a standstill before she should collide with a vessel which she ought to have seen.”

This court, in

The Bailey Gatzert, 179 Fed. 44,

applied the rule to a collision with an anchored dredge in Portland harbor, Judge Morrow stating it as follows:

“The channel of the Willamette River between the Columbia River and the City of Portland carries a large commerce, and the vessels engaged in its transportation are to be expected at all points and at all hours in passing up or down the river.

It was therefore the duty of the Bailey Gatzert to have exercised the utmost caution in navigating this channel in a fog. The *Pennsylvania*, 86 U. S. 125, 133; 22 L. ed. 148. A rule applicable to such a situation was to proceed at such a rate of speed as would enable her after discovering a vessel through the fog to have stopped and reversed her engines in time to prevent a collision. The *Great Eastern*, Brown & L. 287, 291; The *Nacoochee*, 137 U. S. 330, 339, 11 Sup. Ct. 122; 34 L. ed. 687; The *Umbria*, 166 U. S. 404, 417, 17 Sup. Ct. 610, 41 L. ed. 1053; The *Belgian King*, 125 Fed. 869, 876, 60 C. C. A. 451. This she did not do, and she was therefore clearly at fault.”

The foregoing authorities, to which many might be added if necessity required, show it to be a settled rule of law that a vessel must proceed at such a rate of speed in a fog as to enable her to come to a standstill before she collides with a vessel which she can see, whether the other vessel be underway or motionless. Apply the rule to the facts of the collision between the “*Transit*” and the “*Fullerton*”, and the condemnation of the former must follow just as certainly as did that of the vessels in the cases from which the rule has been drawn. We take the facts showing such violation of the rule, as they were given by the master of the “*Transit*”:

“Q. Under what speed did the steamer ‘*Transit*’ proceed on the trip across the bay?

A. Well, she was under a slow bell, that is, as close as we could shut her off without losing steerage-way. I should say, perhaps, *seven miles an hour*; perhaps a little more or perhaps a little less. (Apostles, p. 476.)

* * * * *

“Q. Now, how far distant would you judge yourself to be at the time that you saw the ‘Fullerton’ light?

A. Well, the fog was so dense it could not be seen more than a couple of hundred feet anyway. I could not tell you just how far. You can’t gauge the distance in a fog; it is impossible.

Q. I am asking your best judgment.

A. Well, it might have been 200 feet, or it might not have been that much.

Q. It might not have been that far?

A. No, it might not.

Q. It might have been farther?

A. No, you could not have seen it much farther. (Apostles, p. 75.)

* * * * *

“Q. When these ferry-boats approach the slips, the ferry-boats with side wheels, they can run almost into the slip before they have to stop and back?

A. Some of them can.

Q. Is that true of your vessel?

A. No, you have to give her time.

Q. In what distance can you bring your vessel to a stop?

A. Well, from the time I slow, at about three boat lengths of it, I run her under slow bell one length, and then run her under stop-bell for a couple of hundred feet, and then I go back the whole length of the slip, and go back hard to fully stop.

Q. As you usually run across the bay, *in what distance can you bring your vessel to a stop?*

A. We do not stop the engine right at the same time. I am answering it to the best of my ability right now.

Q. I am asking you for the distance, how far?

A. Well, we will say between eight and 900 feet.

The COURT. *Do you mean in the case of an*

emergency where an attempt is made to stop as soon as possible?

Mr. CAMPBELL. *Yes:*

A. Under full speed you can't stop her inside of almost three boat-lengths the way we stop.

Q. *Running at seven miles an hour in what distance can you stop her?*

A. *That is pretty near full speed, between 800 and 900 feet, the way we stop in an emergency. If you stopped the engines and tried to back her, she will not; she will jam. We have got to slow the engines first so as to give her time to recover herself; she has low pressure engines, and don't answer very well; she will jam and not back. (Apostles, pp. 77-78.)*

* * * * *

Q. Who reported the 'Fullerton's' lights?

A. The second officer, from the bow. It was his voice that I heard reporting a light on the port bow close aboard.

Q. Will you tell the Court, if you please, what you did after that, within your knowledge?

A. I was watching my compass and making my course to the best of my ability *when I heard the report from the bow 'a light on the port bow close aboard.'* I looked up instantly and seen the light then, and I instantly shoved my helm to port and struck the jingle bell to go ahead full speed; and then I looked up again and seen there was no chance to avoid her, and at the same time I heard my first officer say 'Stop her, Captain,' and I did so; I rang the bell. At that time the light was over my jackstaff, and the first officer ducked down, he thought the jibboom of this bark was going to catch the pilot-house, catch him, and he ducked to avoid it, and we landed right across her bow, and she took our smokestack out, and we got in under her jibboom, and her jibboom carried away our box-cars. (Apostles, p. 51.)

* * * * *

“Q. And when you saw that light you rang full speed ahead?

A. Yes, and put my helm hard-aport.

Q. You threw your helm hard-aport?

A. Yes.

Q. What did you do next?

A. Then I stopped her—immediately rang two bells.

Q. Didn't you go under the full speed ahead bell at all?

A. No time.

Q. Then you stopped her?

A. *When I seen there was no chance to avoid her, I stopped her.*

Q. But you did not back her?

A. *I had no time to back her; I might kill the men in the engine-room if I did. I was looking out for the men in the engine-room. If I had backed and my walking-beam had caught on that, it would have killed the men in the engine-room, sure.*

Q. Why is that?

A. Because the walking-beam going up and down, might have caught in the jibboom and killed them in the engine-room.

Q. *At the time you stopped you were right under her bow?*

A. Yes.

Q. Where was her bowsprit pointing?

A. She was lying right across like that (illustrating).

Q. Her bow was to the north?

A. To the north; yes.

Q. Whereabouts at the time you stopped her was her bowsprit pointing?

A. Right across the bow, right across my deck.

Q. When you stopped your engine?

A. She had not crossed then, but it was close to us.

Q. What you have alleged in your libel is true, isn't it—let me ask you to listen to this, this allega-

tion in your libel, see if it is not true; 'that 3 or 5 minutes later the lookouts last above mentioned reported a light upon the port bow of said steamer "Transit" and close aboard?'

A. Yes.

Q. 'When her helm was put hard-aport and a signal given to her engineers for full speed ahead, trying to sheer off from any vessel indicated by such light?'

A. That is right.

Q. 'But that it was then too late to avoid collision with the barkentine "Fullerton" hereinafter described, upon which said light was exhibited, the bowsprit thereof being not more than 2 or 3 feet back from the forward pilot-house of the "Transit?'''

A. I could not tell you at the time the bell struck—when this bell, *when this light was reported to me first I looked up from my compass and I saw a light right there. I could not tell how far it was off, and I rang the bell and shoved my helm hard-aport—rang the bell for full speed ahead. Then I looked down again and I seen that the light was too close aboard to avoid it, and I struck the bell to stop. My first officer said at the same time that I struck the bell to 'stop her, Captain.'*

Q. At the time you stopped her, is it not the fact that the bowsprit of the 'Fullerton' was practically over your deck?

A. Not at the time my boat was running ahead; at the same time when I struck the bell, it was not over the deck; when I struck the bell to stop it was not over the deck.

Q. How far off was it?

A. There was a dense fog; I could not tell you.

Q. You could not tell?

A. No.

Q. At the time you stopped her, where was the light on the 'Fullerton?'

A. It looked to me close over the jack-staff when I struck the bell.

Q. Over the jack-staff?

A. Yes.

Q. When you stopped her what did the flood tide do with your vessel?

A. The flood tide was carrying us on her.

Q. Which way?

A. It set her on top of the 'Fullerton.' " (Apostles, pp. 71-73.) (Italics ours.)

Here, then, is the evidence by which the "Transit" is to be judged:

A steamer 335 feet long and of broad beam (Apostles, p. 76), running across the bay in one of the world's largest ports, where numerous vessels were known to be plying (Apostles, pp. 61-2), in a fog so dense that the lights of another vessel, whose anchored position was known, could not be seen more than 200 feet, and yet proceeding at a speed of seven miles per hour, under which it required, even in an emergency, between 800 and 900 feet to stop! And at that, a vessel equipped with engines which could not, by reason of their design and construction, be immediately reversed from full speed ahead.

If it be the law, of which there can be no question, that a vessel must proceed only at such a rate of speed that she can be stopped in time to avoid collision with another vessel which she can see through the fog, whether the latter be underway or motionless, *then it is certain the "Transit", going at a rate at which she could be stopped only in 800 or 900 feet, in a fog in which an-*

other vessel could be seen only 200 feet, was not proceeding at the speed required by such law. That she was in actual violation of the rule is demonstrated by the master's graphic description of the collision. The truth would seem to be that the "Transit" was traveling at such a speed that when the light of the "Fullerton" was seen through the fog, as the master stated it, "there was no chance to avoid her." (Apostles, pp. 51, 71.) Surely such navigation was not in compliance with the rule so clearly defined by highest authority.

Furthermore, the fact that her engines could not be reversed, by reason of their design and construction, in time to avoid the collision, made certain the excessiveness of her speed.

The Albert Dumois, 176 U. S. 240; 44 L. ed. 751.

Interesting light is thrown upon the contention of "slow speed" which runs through the testimony adduced by the "Transit". The master testified, as we have previously quoted him, that the fog was dense, and the "Transit" was proceeding across the bay under slow bell, "say, perhaps 7 miles an hour; perhaps more, perhaps less." Later, when cross-examined as to the distance within which he could stop the "Transit" in an emergency, from a speed of 7 miles, he remarked "that is pretty near full speed." Whether it was "slow speed," or "pretty near full speed," the record shows that no material reduction over her usual running time had been made in her speed on account of the "dense fog," which every witness admitted pre-

vailed. Take the log. (Apostles, p. 133.) On the first trip it required 44 minutes 5:43 to 6:27) to cross from Oakland to Mission Bay; the return trip took 38 minutes, from 7:14 to 7:52; the following trip from Oakland back to Mission Bay, 8:01 to 8:40, required 39 minutes; the return to Oakland was made in 54 minutes (9:30 to 10:24). On the next trip, leaving at 10:53, she was out 32 minutes at the time of the collision, granting that it occurred at 11:25. If it also be the fact that the bell on the slip, as shown by the log, was heard before the collision (Apostles, pp. 50-51, 69, 83), and if it be a further fact that the slip's bell usually could be heard 6 or 7 minutes off, it is manifest that the "Transit" was crossing the bay in about 39 minutes, or her usual running time. But to state it conservatively, if the slip's bell could usually be heard 6 or 7 minutes off, and it required 40 minutes to make the trip, the bell would not be heard until the "Transit" was some 33 or 34 minutes out from Oakland toward Mission Bay. But on the trip in which she ran into the "Fullerton", the master says that he heard the bell when he got over (from Oakland towards Mission Bay) about 22 or 23 minutes. If the latter were true, and his vessel was then sent ahead at her usual running speed so as to get to her slip in 6 or 7 minutes after hearing the bell, she would have made the trip in the unprecedented time of 30 minutes, as against 38 minutes for the fastest made during the earlier hours of the evening and night, when no fog prevailed. At 38 minutes for the trip, the bell would not be heard for 31 minutes after

leaving Oakland. On this "slow" trip it was heard in 22 or 23 minutes. If the collision occurred at 11:25, the "Transit" was then 33 minutes out from Oakland. If at that time the slip bell could be heard, and it was only six or seven minutes off, the trip could have been completed in 38 minutes. It would thus seem to follow beyond all doubt that the "Transit" was proceeding at approximately the same speed as on all other trips, fog or no fog.

And what else could the master have had in mind when, in discussing the rate of speed necessary to the maintenance of steerageway, and after fixing it at that of the "Transit's" on the trip in question, 7 knots, he said:

"I have been running over thirty-five years at that average speed." (Supp. Apostles, p. 81.)

C. Speed Excessive Even Though Necessary to Steerageway.

It doubtless will be urged that the speed was not excessive because it was as slow as the "Transit" could go and maintain steerageway. The master so testified (Apostles, p. 47). At the same time, he admitted that he could not give the speed in knots at which she could keep steerageway. Whatever the speed required for steerageway, it has been established beyond question that the "Transit" was in flagrant violation of the rule against excessive speed. The fact, if it were a fact, that she could only be steered under what would other-

wise be excessive speed, is no legitimate excuse for the violation of the rule forbidding it. If she could only proceed, in the fog, at an immoderate speed and still be kept under steerage control, it was the duty of her owner to cease running her until the fog lifted, for the inability of the "Transit" to steer at a moderate speed was no license to her owner to thus endanger the lives and property of others. It was so held by the Supreme Court in

The Pennsylvania, supra,

where Mr. Justice Strong said:

"It is true her master, while admitting she was going seven knots, states that he don't consider she could have been steered going slower—could not have been steered straight. And two other witnesses testify that, in their opinion, she could not have been navigated with safety and kept under command at a less rate of speed than seven miles an hour. These, however, are but expressions of opinion based upon no facts. They are of little worth. And even if it were true that such a rate was necessary for safe steerage, it would not justify driving the steamer through so dense a fog along a route so much frequented, and when the probability of encountering other vessels was so great. *It would rather have been her duty to lay to.*"

We respectfully submit, therefore, that the "Transit" has not overcome the presumption of fault raised against her as the moving vessel, but, on the contrary, that the record affirmatively shows her positive violation of the rule against excessive speed.

III.

THE "TRANSIT" VIOLATED THE SECOND PARAGRAPH OF RULE 16 BY FAILING TO STOP HER ENGINES ON HEARING THE FOG BELL OF THE "FULLERTON".

The Second Paragraph of Rule 16 of the Inland Rules provides:

"A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

The foregoing rule is identical with Rule 16 of the International Rules, both making it obligatory to immediately stop the engines on hearing apparently forward of the beam the fog signal of another vessel whose position is not ascertained. The rule being statutory, its violation imposes upon the guilty vessel the burden of proving not only that *probably* the fault *did not* contribute to the collision, but that it *could not* have done so.

The rule was before Judge Bean, sitting in the United States District Court for the Northern District of California, in

The Beaver, 197 Fed. 866.

His opinion is so perspicuous, and contains so excellent a statement of the purpose and effect of the rule, that no further citation of authority is necessary to demonstrate the legal effect of the "Transit's"

failure to stop her engines on first hearing the fog bell of the "Fullerton."

Of the rule, Judge Bean said:

"It therefore does not leave the navigation of a vessel, when a whistle is heard apparently forward of her beam, the position of which is not ascertained, to the master's judgment, but assumes that the zone of danger of collision is reached when the whistle is heard, and forbids the ship to enter such zone except after stopping its engines to ascertain the position of the oncoming ship.

* * * * *

"The law is that where a vessel has permitted a positive breach of a statutory duty, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so."

It will, of course, be contended that Rule 16 has no application to the present case because of the fog bell of the "Fullerton" not being heard. This presents the question as to the location of the bell heard on the "Transit". It is true that all of the "Transit's" witnesses testified that the "Fullerton's" fog bell was not heard before the collision. The master, first officer and some of the lookouts admitted hearing a fog bell, but assert that it was the bell established by the Southern Pacific Company on the Mission Bay slip to assist the "Transit" in locating the slip in foggy weather. On the other hand, if the testimony of the master is to be accepted, the record proves to a demonstration that the bell first heard could not have been the slip bell, but was the "Fullerton's".

The master testified that when he "got well over about 22 or 23 minutes, somewhere out there, he heard the fog bell." (Apostles, p. 69.) Assuming that the "Transit" was then running as fast as she did on her best trip that night, though the master claimed that she was under slow bell, she would have crossed the bay in 38 minutes. (Apostles, p. 133.) (Log Book. Trip from Mission Bay to Oakland, 7:14 to 7:52.) If the master heard the fog bell when she was 22 or 23 minutes out from Oakland, it is manifest that he heard it at least 15 minutes before the "Transit" would have reached the slip. Were the "Transit" actually going slower than her customary speed, the bell was heard *more than 15 minutes before* she would then have completed the trip. We are, therefore, looking at the case in its aspect most favorable to the "Transit", when we assume that the master heard the bell, wherever it was, when the "Transit" was 15 minutes off the slip.

This is most significant because later in his testimony the master stated that he *usually heard the slip fog bell 6 or 7 minutes off.*

"Q. This night that you were approaching the San Francisco shore you heard this fog bell?

A. I did, on the slip.

Q. You say it was the slip?

A. Yes.

Q. *How far off do you usually hear that fog bell?*

A. *You can hear it 6 or 7 minutes off.* (Apostles, p. 78.)

If it be true that the slip bell was usually heard 6 or 7 minutes off the slip, then it *certainly was not the slip*

bell which was heard 15 minutes off,—22 or 23 minutes after leaving Oakland mole.

That it could not have been the slip bell is shown by the following additional testimony of the master:

“Q. In what sort of box is this bell on the dock inclosed?

A. It is inclosed in the rear and open in the front, a sounding-board behind it.

Q. A sounding-board with a flare-out, isn't it?

A. Yes, a flare-out.

Q. That flare-out points toward the Oakland mole?

A. It points right out from the slip; if you are *either side of it, you can't hear it very well; if you are right in front of it you can get the sound.*

Q. That flare-out is toward the Oakland mole, isn't it?

A. It is right out from the end of the slip; it stands right up from the end of the slip.

Mr. HENGSTLER. Q. *Toward the Oakland mole?*

A. *No, not towards the Oakland mole, but it flares right out in front of the slip.*

Mr. CAMPBELL. Q. Doesn't it flare out parallel with the fairway you are running on?

A. Not parallel, no, because we don't run altogether parallel; we have got to run with the tide; it would not do to have that bell parallel; if there was a flood tide, we would have to be more to the northward, and if an ebb tide to the southward, 2 points to 2½ points difference in our course. This course I am steering on, I have steered for over 10 years, to same course.”

(Apostles, pp. 86-87.)

The flare-out of the slip is thus placed so as to throw the sound *straight out*, from the slip, and not toward the Oakland mole from whence the “Transit” was coming. If, as the master says, the slip bell

could not be heard very well on either side of the line of the flare-out, how could it possibly be heard *on this particular trip*, eight minutes earlier than usual, when the "Transit" was crossing the bay, not on a course directly from the mole to the slip, but on one (S. W. $\frac{1}{2}$ S.) which carried the "Transit" *further to the northward, and thus to one side of the flare-out*, to allow for the effect of the flood tide and slow bell? (Apostles, pp. 57-8.) Surely, if the flare-out pointed right out from the slip so as to make it equally of use in ebb and flood tides, and the bell could only be heard when the "Transit" was straight in front of it, six or seven minutes off the slip, it is not reasonable to believe that the bell was heard on the "Transit" while she was still 15 minutes off, on a course which carried her to the northward of the slip, out of the range of the flare-out.

Again, that it was the "Fullerton's" bell, and not the slip bell, that was heard finds substantiation in further attending circumstances.

The master testified that the bell came from a point right straight ahead. (Apostles, pp. 69-70.) Shortly afterward the "Fullerton's" light was observed close aboard over the jack-staff of the port corner of the bow. Thus it is certain that the "Transit" was headed directly for the "Fullerton" at the time the light was seen, a conclusion demonstrated by the fact that the "Transit" landed almost squarely across the "Fullerton's" bow after having had her helm put hard-aport, while maintaining headway under her running speed, assisted by a full ahead on her engines. At the

time the master saw the light, the "Transit" was heading southwest. (Apostles, p. 70.)

If the position of the "Fullerton" is located upon Claimant's Exhibits 1 or 2, as stated by the master of the "Transit", to wit, 1000 yards, E. N. E. from the slip, and a line is drawn through such position, N. E. and S. W. indicating the course of the "Transit" at the time the "Fullerton's" light was seen, it becomes apparent at once that *the slip* on which the bell was located *was not straight ahead of the "Transit", on such a course, but far to starboard.* It follows, therefore, that if the "Transit", at the time the bell was heard straight ahead, was running directly toward the "Fullerton", on a southwest course, it must have been the latter's bell that was heard ahead and not the slip bell then bearing to one side.

The logic of this conclusion finds support in the master's explanation of their utter disregard of the whereabouts of the "Fullerton". He testified that there was no query raised in his mind as to why the "Fullerton's" bell was not heard, because he thought that he was far enough to the northward of the "Fullerton" not to hear it, and did not suspect that he was in her vicinity. (Apostles, pp. 79-80.)

In thus thinking that he was to the northward when he heard ahead what he accepted as the slip bell, he must have anticipated hearing it from that direction when the "Transit" would in fact reach a position to the northward of the "Fullerton". But he was not then to the northward, hence the bell he heard ahead

could not have been the slip bell, as the latter, if heard at that time, with the "Transit" headed southwest toward the "Fullerton", would have sounded not from ahead, but from starboard. If, while on a southwest course, the "Transit's" bow would point to the slip when to the northward of the "Fullerton", it certainly would not be toward the slip after the "Transit" had drifted southward to the vicinity of the "Fullerton", if the compass course remained unaltered.

The bell, then, which would be heard ahead when the "Transit" was to the northward of the "Fullerton", steering southwest, could not be the same bell heard ahead when she was more to the southward, still steering the same compass course. Under these circumstances, the fact that within a few minutes after the bell was heard, the "Fullerton's" light was seen practically straight ahead, makes it certain that the bell in question heard ahead was the "Fullerton's".

Yet even more significant is the fact that though the bell was heard before, it was not heard after the collision. (Apostles, p. 53.) If it was the slip bell that was being rung so that it was heard by the "Transit" 22 or 23 minutes after she left the Oakland side, why was it not heard by those on the "Transit" after the collision, for admittedly the "Transit" was then closer to the slip than when the bell is claimed to have been first heard? Further, if the slip bell was being rung at the time claimed, to assist the "Transit" in locating the slip, for which purpose it was installed, why did its ringing cease upon the collision? Cer-

tainly no reason existed for its stopping as the "Transit" had not then had time to reach the slip; on the contrary if being rung to assist the "Transit" in anticipation of her arrival, there was every reason, upon her failure to appear when due, for the ringing to continue, with even greater vigor, until the "Transit" either arrived, or her failure to reach the slip was explained to those on shore. Certainly no logical reason can be given for the slip bell then ceasing to ring. As those in charge of the slip bell for appellee were not called as witnesses, we have no opportunity of inquiring into the strange coincidence, if it be a fact that the bell had been ringing prior to the collision.

Those on board the "Fullerton" at the time of the collision testified to the ringing of her fog bell, and the court so found as a fact. Such finding having been made by the trial court, after hearing the witnesses, this court will not disturb it on appeal unless it clearly appears that it was against the evidence.

The Bailey Gatzert, 179 Fed. 44, 48.

All of the foregoing circumstances lead to but one reasonable conclusion, that the "Transit's" witnesses, thinking they were further to the northward of the "Fullerton" than they were, mistook her bell, actually heard ahead, for the slip bell, which they expected, in such assumed northward position, to be heard ahead.

Thus hearing the "Fullerton's" fog bell forward of her beam, the "Transit" was in positive violation of Rule 16, for it is manifest, first, that the "Fullerton's" position was not ascertained on hearing the

bell, as the "Transit's" witnesses mistook it for a land fog signal, and second, that she did not immediately stop her engines, and then navigate with caution. The effect of such violation of the rule was to impose upon the "Transit" the burden of showing not only that probably her fault did not contribute to the collision, but that it could not have done so.

Proof of that character could not be made, for it would be impossible for the "Transit" to show that even if she had stopped her engines on hearing the fog bell, the collision would have occurred. On the contrary, the probabilities are that it would not have happened as she then could have reversed and stopped her headway, or passed the "Fullerton" astern.

We respectfully submit, therefore, that the District Court erred in not holding the "Transit" in violation of the second paragraph of Rule 16 of the Inland Rules.

IV.

THE "TRANSIT" WAS NEGLIGENTLY NAVIGATED IN THAT SHE DID NOT STOP AND REVERSE HER ENGINES ON FIRST SEEING THE "FULLERTON'S" LIGHT.

The "Transit's" fault in not immediately reversing cannot be better described than by quoting from the master's statement of the circumstances leading to the collision. On direct examination, he testified:

"Q. Will you tell the court, if you please, what you did after that, within your knowledge?

A. I was watching my compass and making my course to the best of my ability when I heard

the report from the bow, 'a light on the port bow close aboard'. *I looked up instantly and seen the light then, and I instantly shoved my helm to port and struck the jingle-bell to go ahead full speed; and then I looked up again and seen there was no chance to avoid her, and at the same time I heard my first officer say 'Stop her, Captain,' and I did so; I rang the bell.* At that time the light was over my jack-staff, and the first officer ducked down, he thought the jib-boom of this bark was going to catch the pilot-house, catch him, and he ducked to avoid it, and we landed right across her bow, and she took our smokestack out, and we got in under her jib-boom, and her jib-boom carried away our box-cars. * * *'' (Apostles, p. 51.)

(See, also, Apostles, pp. 54, 71, 73, 75, 84.)

That the master erred in ordering her engines full speed ahead is evidenced by the picturesque protest of the first officer immediately after the order for full speed ahead was given:

“Q. What signal was given to the engineer? Did you observe what signal was given to the engine room?

A. Yes, I did. He was given the jingle-bell.

Q. Then what next?

A. The captain, he put his helm hard-aport and gave them the jingle-bell, and in the meantime when he gave them the jingle-bell I seen the bowsprit of the 'Fullerton' coming right for the pilot-house, and I told the captain, I said 'For God's sake, stop your engines entirely'. We were right square across the 'Fullerton's' bow, or the vessel's bow. I didn't say the 'Fullerton's' bow, but the vessel's bow, and he gave them two-bells in the engine-room; that means for to say to stop. Then the time was so short that I don't think

the engineer had time to give half a turn or quarter of a turn on the engines.

Q. How did the ships come together?

A. The 'Transit' went right across the 'Fullerton's' bow, right under the guard until she was pretty near amidships. Her bowsprit scraped over the whistle-wire that leads from the pilot-house to the funnel, and barely missed the front of the pilot-house where the three of us was in, the captain, myself and the apprentice pilot." (Apostles, p. 92.)

The error of the master upon seeing the light of the "Fullerton" slightly over his port bow, close ahead, in ringing for full speed ahead and porting his helm, in an attempt to cross the bows of the "Fullerton", towards which he knew the "Transit" would be set by the flooding tide, clearly falls within the condemnation of the courts, as a breach of the rule requiring immediate reversal on approaching another vessel in a fog.

We shall content ourselves with reference to a few decisions, out of the host that might be cited, to show the general application of the rule:

The State of Alabama, 17 Fed. 847, 853;

The Pottsville, 24 Fed. 655;

The Wyanoke, 40 Fed. 702;

The Nymphaea, 84 Fed. 711.

We respectfully submit, therefore, that the District Court erred in not holding the "Transit" at fault for failure to immediately reverse her engines on seeing the "Fullerton's" lights.

V.

THE "TRANSIT" WAS NEGLIGENTLY NAVIGATED IN THAT HER MASTER WAS IN THE PILOT-HOUSE, ENGAGED IN STEERING HER, INSTEAD OF DEVOTING HIS UNDIVIDED ATTENTION TO THE DUTY OF MASTER IN HER NAVIGATION, AND IN THAT NO NAVIGATING OFFICER WAS STATIONED OUTSIDE OF THE PILOT-HOUSE.

Vessels have been frequently condemned for want of proper lookouts stationed forward, to detect the presence of other vessels and report them to the navigating officer in command, as the courts have required no rule for the prevention of collisions to be more strictly observed.

The Colorado, 91 U. S. 692; 23 L. ed. 379.

The due regard for safety which thus demands the stationing of lookouts, necessitates the presence of a navigating officer, ever prepared to instantly act in the control of his vessel as the exigencies of the situation require, either upon his own information or upon advices received from the lookout. To thus require the maintenance of a vigilant lookout without having an officer in control equally diligent in the performance of his duties as the one in command, would be as fatal to careful navigation as would be the keeping as lookout of one who had other duties to perform.

The dual capacity in which the master of the "Transit" acted was palpably violative of this requirement of proper navigation. He was in command of the "Transit", the one who was giving all directions to the engineer. (Apostles, pp. 61, 92, 98, 107, 109.) At

the same time, he was also doing the work of a quartermaster, steering the "Transit" across the bay. (Apostles, pp. 51, 52, 61-2, 67, 68-69, 71, 73, 74, 75, 76, 98, 109.)

Can it be said that such was proper navigation? The admitted circumstances leading to the collision is its best refutation. The "Transit" left Oakland mole at 10:53 p. m., with the master in command and manipulating the steering wheel, on a trip across the bay, on which numerous vessels were known to be plying, to Mission Bay slip, off from which the "Fullerton" was known to be anchored. Shortly after leaving the mole a dense fog was encountered, which continued throughout the remainder of the trip. Notwithstanding the fog, the master remained in the pilot-house, standing approximately two and a half feet back from the window, with his eye fixed upon the bright compass card, lighted by the binnacle, and his attention closely centered upon the maintenance of the steamer's compass course. Suddenly, at a time when, from the course he had been steering, he thought he was to the northward of the ferry slip, he was advised by the lookout on the lower deck of a light on the port bow, close aboard. Not on watch for lights, *he instantly looked up*, and seeing the light, shoved his helm hard-aport, rang the jingle-bell full speed ahead, and *then looked up again*, and saw no chance to avoid her. At the same time, hearing his first officer say, "Stop her, Captain," he rang his stop bell and "landed right across her bow".

What could be more manifest than that the double duties which the master was performing, prevented his undivided attention to the navigation of the vessel? The fact that the master did not see the lights of the "Fullerton" until he "*looked up*", and did not observe the error of his going full speed ahead on his engines until he had "*looked up again*", after turning his attention to the manipulation of the steering wheel, shows that for a moment, at least, he could not diligently perform his duties as master. Had he been stationed outside of the pilot-house, alert to his duties as master, and not distracted by the work of operating the steering wheel, he would have been free to have fixed his undivided attention upon the light, even if he did not, from his elevated position, first discover it, and would doubtless have determined more quickly than he did, the error of his ordering full speed ahead under a hard-aport helm in an effort to cross the bows of the anchored vessel.

The condemnation deserved by the practice of thus burdening the master of a large, unwieldy car-ferry, traversing, in foggy weather, waters over which thousands of lives are daily transported, to say nothing of the safety of ships, cannot be more aptly made than in the words of Mr. Justice Clifford, in

The Colorado, supra,

wherein he said:

"Steamers of such size, under such circumstances, ought never, in a dark night, to be without a watch on deck sufficiently effective to change the course of the vessel with celerity, without withdrawing

the lookout from his station and appropriate duties; nor is it good seamanship for the officer of the deck, if without any assistant in the navigation of the vessel, to station himself in a position where he cannot in such an emergency give immediate signals to the engineer in charge. Even seconds are of great importance when the peril is impending and the danger imminent, as the lives of all on board and property to a large amount may be sacrificed by a moment's delay."

(23 L. ed. 379, 382.)

It was not alone, however, in the fact of the master performing two separate and distinct duties that the "Transit" was negligently navigated. Equally flagrant was the navigating officer's failure to keep to his station outside of the pilot-house. Instead, the master, the first officer and the assistant pilot were all snugly behind two open windows, the master at least two and a half feet back of the one nearest to him. Thus placed, with his attention on the steering, he might as well have been within four solid walls so far as any contribution on his part to the navigation of the steamer in the fog, as the officer in command.

Palliation is offered in the fact that the chief officer *leaned out* of one of the two open windows. Rather than supplying the deficiency in careful navigation, the fact of the first officer doing as he did, only emphasized the negligence of the navigating officer in not keeping to his station outside, for, if the fog signals of other vessels could have been heard better within, than without, the pilot-house, so as thus to have justified the position of the navigating officer,

the first officer, if diligently attending to his duty, *would not have leaned out of the window*, “listening for any kind of a noise”. (Apostles, pp. 89, 173.) The very fact of his leaning out, therefore, shows conclusively the necessity of the navigating officer being without, and not inside, the pilot-house.

In thus remaining in the pilot-house during the prevalence of fog so dense as to be impenetrable more than 200 feet, the conduct of the officers was hardly commensurate with the degree of care which the maintenance of five lookouts on the lower deck demonstrated to be necessary to the safe navigation of the “Transit” across San Francisco Bay.

We respectfully submit, therefore, that the “Transit” was negligently navigated in the particulars specified.

VI.

THE COLLISION IS NOT TO BE ATTRIBUTED TO INEVITABLE ACCIDENT OR INSCRUTABLE FAULT.

To support the District Court’s decision of inevitable accident, this court must find that the “Transit” was without fault and that she could not have prevented the collision by the exercise of ordinary care, caution and maritime skill.

The Morning Light, 2 Wall 550; 17 L. ed. 862.

In view of the fact, as we have already pointed out, that the “Transit” has not overcome the presumption of fault resting against her for having collided with an

anchored vessel, the position of which was previously known; that she was running at an immoderate rate of speed, excessive both *per se*, and in that she could not stop before striking the "Fullerton" after seeing the latter's lights through the fog; that she was not stopped and navigated with caution upon hearing the "Fullerton's" bell, as required by rule 16 of the Inland Rules of Navigation; that her engine was so constructed that it could not be immediately reversed; that she was not stopped and reversed immediately upon seeing the "Fullerton's" light, but instead, her engine was put at full speed ahead, and was then stopped at the time she was upon the "Fullerton"; that her master was not attending to his duties as such, but performing the work of a quarter-master; and that no navigating officer was maintained outside of the pilot-house, though the steamer was traversing, in a dense fog, a bay frequented by many passing vessels, each and every of which acts condemn the "Transit", it is impossible, we respectfully submit, for the court to hold that the "Transit" was so without fault as to have shown her to be in full compliance with the rules governing collisions between moving and anchored vessels. Unless she has affirmatively shown herself to be free of fault, the defense of inevitable accident cannot prevail.

Nor, for the same reasons is the decision of the District Court sustainable on the ground of inscrutable fault. To constitute inscrutable fault, the court must find that a fault has been committed, but be unable, from conflict of testimony, or otherwise, to locate it.

The Worthington and Davis, 19 Fed. 836.

The District Court did not find any fault on the part of the "Fullerton". She was anchored within a permitted zone, her position being known to the "Transit" for a long time prior to the collision; her light was burning, and her fog bell ringing, all in strict compliance with the duties resting upon her as an anchored vessel.

On the other hand, we have previously pointed out fault after fault on the part of the "Transit", which, on the testimony of her own witnesses, makes her solely responsible for the collision.

We respectfully submit, therefore, that the court erred in holding the collision to be the result of inevitable accident or inscrutable fault.

We further respectfully submit that the decree of the District Court dismissing the libel of appellant should be reversed and the cause remanded to the District Court with instructions to enter a decree in favor of appellant (cross-libelant) and against appellee (libelant) in such sum, with interest, as appellant shall prove to have been damaged by reason of said collision, together with such other and further relief as shall be deemed to be meet and equitable in the premises.

October 18, 1913.

Respectfully submitted,
 EDWARD J. McCUTCHEN,
 IRA A. CAMPBELL,
 McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

No. 2262

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MISSION TRANSPORTATION AND REFINING
COMPANY (a corporation), claimant
of the Barkentine "Fullerton," etc.,
Appellant and Cross-Appellee,
VS.

SOUTHERN PACIFIC COMPANY,
(a corporation),
Appellee and Cross-Appellant.

BRIEF FOR CROSS-APPELLANT.

First. Statement of the Case.

This is a case of collision between the barkentine "Fullerton" and the Southern Pacific car-ferry "Transit" on December 13, 1909, at about 11:25 P. M.

The "Fullerton" was lying at anchor in Mission Bay in a position regarding which there is conflict of testimony. It is part of the case that she was anchored in a proper place, but we contend that her place of anchorage was improper.

The collision occurred in a heavy fog.

The steamer "Transit" was one of the regular freight car ferries of the Southern Pacific Company and was on one of her regular trips from Oakland pier over to Mission Bay. She has passed the "Fullerton," during the period of the latter's anchorage, on several trips per day. Shortly after the "Transit" left the Oakland side, the fog set in. After that she proceeded under slow bell, a speed just consistent with steerage way.

One of the questions of fact entering into this case is, whether the "Fullerton," enveloped in fog as the "Transit" approached, sounded her fog signals. It is claimed for her that she did; but we contend that she failed to do so, and that her failure was one of the causes of the collision.

Second. Specifications of Error.

For convenience, the points involved in our assignments of error (Ap. p. 197) will be discussed under the following headings:

I.

The "Fullerton" was lying at an improper anchorage.

II.

Therefore the presumption of fault ordinarily imported to the moving vessel does not apply.

III.

The collision was caused by the negligence of the "Fullerton."

IV.

The navigation of the "Transit" was without fault.

Third. Argument.

I. THE "FULLERTON" WAS LYING AT AN IMPROPER ANCHORAGE.

The testimony is contradictory as to the place of her anchorage.

a. *Bearings taken by "Fullerton" witnesses.*

The "Fullerton" witnesses, of course, testify that they took bearings of her position, and that these bearings take her out of the forbidden anchorage. The accuracy of the bearings they took may be seen from the various positions in which they locate her on the chart (Claimant's Exhibit).

The master of the "Fullerton" located her at the point *F* (Ap. p. 139).

Her nightwatchman locates her at the point *H* (Suppl. Ap. p. 5).

Appellant's witness, R. B. Hemming, Sr., ex-mariner and visitor on board, took her bearings at about half past four on the afternoon of the collision, from "second nature" (Suppl. Ap. p. 70).

He located her at the point *K* (id. p. 67).

Appellant's witness, Ferris, marine superintendent of the Union Oil Company, which operated the "Fullerton," places her at the point *L*.

These witnesses are all interested in locating the anchorage place of the "Fullerton" as far away from the "Forbidden Anchorage Ground" established by the State Harbor Commissioners as possible. The testimony of these witnesses is interesting in several respects. It shows, in the first place, how much reliance can be placed upon these so-called "bearings," the locations established by them varying by more than one-half a mile, a difference of exceeding importance in connection with this case. It shows, in the second place, that the two important witnesses for the "Fullerton" (being practically her only eye and ear-witnesses of the collision) practically agree upon her position—possibly because they are father and son, or possibly because they are better mariners than the master of the vessel. They place the "Fullerton" more than twice as far from the ferry-slip *T* as the master of the "Fullerton," who, ordinarily, would be presumed to speak with greater authority on this subject than the boy who acted as nightwatchman, or his father, who was a casual visitor on board. Obviously the bearings taken by the "Fullerton" witnesses do not tell us within more than half a mile where she lay at anchor.

- b. *Other testimony by "Fullerton" witnesses as to her anchorage place.*

The witnesses for the "Fullerton" give testimony, however, which is a better index to the position in which she lay at anchor.

Captain Grant testified, in answer to Mr. Campbell's questions:

Q. Had you ever seen the car-ferry "Transit" come across the bay and land at the ferry slip?

A. I have never noticed it land. I have seen it pass by the ship.

Q. Which way coming and which way going on those trips?

A. One going to Oakland and one to the city on the east and southwest, approximately.

Q. How close would she pass to the anchored position of the "Fullerton"?

A. Sometimes she would pass within 100 feet of us when we would be lying to an ebb tide; she would pass within 100 feet of us, sometimes perhaps closer. (Ap. p. 144.)

Again he says, on cross-examination:

A. Well, the engineer remarked to me that she used to come too close, and *I have had to haul my boat up lying astern to get clear of her. On certain stages of the tide she came too close to the ship.* (Ap. p. 159.)

Q. You noticed, also, she used to come too close?

A. Yes, sir.

Q. Was that the regular thing, that she was passing you at a very short distance?

A. As I say, at certain stages of the tide you could come close and at flood tide keep away.

Mr. FOULDS. Q. When the tide was ebbing she would come closer sometimes?

A. Closer on an ebb than a flood. The ship would be farther away from the fairway and naturally keep away to counteract the tide. (Ap. pp. 159, 160.)

The *night watchman* testifies, on direct examination:

Q. How many times during the period that you were stationed aboard the "Fullerton" would you say that the "Transit" had passed back and forth across the bay?

A. Well, to my knowledge she had a very irregular service there; sometimes she would make several trips a day and other times she only appeared to make about 3 trips a day.

Q. How close would she pass to you on the different tides?

A. Well, *that distance varied; at times she would come up so close that I would have to haul my small boat up out of the way.*

Q. *On what tide would that be?*

A. *On an ebb tide.*

Q. Which way would the stern of your vessel be drifting?

A. The stern would be tailing to the northward.

Q. How close would she pass to you on the flood tide?

A. *Well, sometimes she came up quite close even on the flood tide.* (Suppl. Ap. p. 17.)

Again he says:

A. There was only once that she came very close to us—a fog before; then she crossed our *bow* when we were laying at an ebb tide. (Suppl. Ap. p. 17.)

It, therefore, appears from the evidence of the "Fullerton" that she was lying so close to the fairway of the ferry boat that the latter would pass within 100 feet to the north of the "Fullerton," sometimes perhaps closer; sometimes so close that the small boat of the "Fullerton" had to be hauled out of the way. Once, in a fog, she crossed the *bow* of the "Fullerton" at an ebb tide, that is to say, she passed the "Fullerton" on the *south* side of the vessel. All this testimony comes from the "Fullerton" side. It shows conclusively that those responsible for the "Fullerton" were well aware that she was in danger of being run down by the ferry, if she remained in her position. That the ferry would come dangerously near; that the small boat was only saved from collision by being hauled up; that the ferry passed the "Fullerton" on either side—all these are *facts* shown by the "Fullerton" witnesses. It is submitted that such facts are more eloquent and more conclusive than rough bearings taken by eye or with a pencil, and that these latter guesses, where in conflict, must yield to the fact admitted by the "Fullerton" that, during the time she lay at her anchorage, the ferry steamer would come dangerously near on either side. The misconduct of the "Fullerton" is fully made and by her own proof.

The fact that the "Fullerton" lay practically in the fairway of the ferry boat, is also shown by the testimony of the witnesses on our side. Granting that originally, two months or more before the acci-

dent, she was placed south of the line AB, the uncontroverted testimony shows that, some days before the collision, she lay in the fairway of the "Transit."

Captain Higginson of the "Transit" testifies that, a couple of days previous to the collision, there was a southeast storm on the waterfront; that, as a result thereof, the vessels in the neighborhood came to a new anchorage. Before the storm the captain had taken no close notice of the "Fullerton," but after the storm he took her bearings, "*because she was then in our fairway*" (Ap. p. 59). "I got her bearings simply to avoid her in case of a fog" (Ap. p. 58). He says, on cross-examination:

Q. As a matter of fact, on several occasions in passing across the bay, you had been so close to the "Fullerton" it was necessary for them to haul their boats in?

A. On the last three or four days she was in our fairway.

Q. Was it confined to that time?

A. It was confined to a few days before the collision, after the storm, after the southeast storm.

Q. At the time you say you took a bearing of her?

A. Yes.

Q. What was the bearing?

A. From the slip, where my boat lay in the slip, it was east, northeast. (Ap., p. 59.)

This testimony is fairly corroborated by *Dr. McAdie*, called as a witness by the other side for the purpose of disposing of the southeast storm; but his

records show that southerly winds prevailed from December 4 to December 10, 1909, and that, on December 4, and again on December 8, 1909 (nine and five days, respectively, before the collision) the southerly winds reached a maximum velocity of 33 miles (Suppl. Ap., p. 64). Claimant's chief witness, the night watchman of the "Fullerton," admits that, in the month of December "we had several blows" (Suppl. Ap. p. 7).

It is submitted that the testimony of Mr. Ferris (Suppl. Ap. pp. 77, 78) is the admission by an interested witness that, under the circumstances of this case, the "Fullerton" might well have dragged her anchor and drifted into the fairway when the southwest wind was blowing which Dr. McAdie's records disclosed.

The evidence above referred to shows, by a great preponderance, that the "Fullerton" in the night of the collision and for a number of days before, was lying in the fairway of the ferry steamer "Transit"; that she knew it, and had, on previous occasions, barely escaped the dangers incident to her position. In spite of this fact those in control of her made no effort to remove her to a safe anchorage place. There was abundant safe anchorage ground to the south of her. We are not dealing with a case like those of dredgers which have a legitimate business purpose in anchoring in particular localities, but with the case of a vessel which was laid up for months and made its home in a dangerous local-

ity, although fully aware of its dangers, and although there were an indefinite number of safe places where she could have settled down for her long rest. It was at all times in her power to avoid all danger by moving to a safe distance. Ordinarily prudence would have dictated such a course after she saw that previous collisions with her small boats could only be avoided by hauling them in. She voluntarily and unnecessarily exposed herself to some danger even in ordinary weather; this danger, from being slight in the day time or in fair weather, became great in a fog. When she insisted on becoming a fixture on a public highway, she assumed the risk of coming into collision with one who was using the highway in a legitimate manner.

The theory of the "Fullerton" seems to be that she is without fault as long as she is not actually in the zone of "Forbidden Anchorage"; that all waters not forbidden are "permitted waters." It is submitted that this theory cannot be relied upon. She is to be charged with fault if the Court finds that, as her own evidence shows, she remained anchored so near to the fairway of the ferry steamer that there had been previous narrow escapes from collision with the steamer, which was sometimes obliged to vary her ordinary course in *accordance with* the condition of the tide and winds.

II. THERE IS NO PRESUMPTION OF FAULT AGAINST THE
“TRANSIT”.

The cases upon which appellant relies for the proposition that the burden of proof is upon the “Transit” to exonerate herself from liability are predicated upon the condition that the anchored vessel was without fault. The *Oregon*, *The Virginia Ehrman*, *The Clara Clerita*, *The Europe*, are all cases of that nature. In the case of *The D. S. Gregory*, Fed. Cas. 4102, cited by appellant, Judge Nelson says expressly:

“If I could agree that there was fault in anchoring a vessel there, I should have but little difficulty in coming to a different conclusion” (11 Fed. Cas. p. 429).

The Bedford, 3 Fed. Cas. No. 1216, also cited by appellant, is a very good illustration of the point where the usual presumption against the moving vessel breaks down. In that case a schooner lay at anchor “near the track” of a ferry boat. The collision took place about eight in the morning; the schooner had cast anchor at about twelve o’clock the day preceding. The mate had been warned about his position. “Indeed, the mate himself states that, while lying at anchor from the preceding day, the ferry boats passed him on his bow at ebb tide, and on his stern at flood tide, the tide tailing his vessel up or down the river as it was ebb or flood.” Judge Nelson said that:

“It was a fault on the part of the schooner to cast anchor within the forbidden limit, and

a still greater one not to remove when the attention of the mate was called to the fact and he was warned of the danger.”

The ferry boat also was held in fault, for failure to use proper precaution.

It is clear that Judge Nelson did not apply the presumption against the moving vessel in this case, but based his decision on the actual proof of the facts. Had he applied the presumption, no evidence of lack of proper caution would have been required to hold the ferry boat liable. The case clearly illustrates that the presumption contended for by appellant does not apply to a case where the anchored vessel is in an improper place.

The case of *The Rockaway*, also cited by appellant, is a case where the Court found easily that the vessel at rest was properly anchored. In fact, she had just arrived in port and was anchored by a pilot in the vessel anchorage ground, known as the “Poor House flats” (19 Fed. p. 450). The occurrence was in New York harbor, a harbor far more crowded with shipping, and where the ferry boat winds its way on an uncertain course through the shipping in its way. It should also be kept in mind that a Court might well find that a vessel just arrived in port may, before proceeding to its place of discharge, come to a proper anchorage in a place where it would be entirely improper for her to anchor as a permanent resting place.

We recognize the validity of the general rule in admiralty as laid down in the cases of *The Virginia Ehrman* and *The Oregon*, that the moving vessel must keep away from a vessel properly anchored and not otherwise at fault, and that collision in *such* cases, raises a presumption of fault against the vessel in motion, placing upon her the burden of exonerating herself from blame for the collision.

But we contend that, where the anchored vessel is improperly moored in the fairway, or appears otherwise at fault, the general rule does not apply.

It was so held in

Graves v. Car Ferry Transp. Co., 183 Fed.,
378 (C. C. A. 7th Circ.).

In that case the Court found that the vessel at rest was improperly anchored, on facts far less conclusive than the facts in the case at bar. In the *Graves* case the anchored vessel was simply "within the usual course of navigation of other vessels," when she could have anchored in better anchorage; in the case at bar she had direct previous indication of the danger of her position. In the *Graves* case the anchored vessel was in the particular place merely while waiting for the arrival of her towing steamer; in the case at bar she insisted on remaining a fixture in a public highway while out of commission for an indefinite period. It is easier in the case at bar than it was in the *Graves* case to find, as a fact, that the vessel at rest was

improperly anchored. When this fact is once found, the principles of the Graves case govern wiping out the presumption against the moving vessel. The Court said:

“The general law of the sea becomes applicable to such collisions, when the anchored vessel is improperly moored in the fairway, or otherwise appears at fault (*Ross v. Merch. & Miners Transp. Co.*, 104 Fed. 302; *City of Birmingham*, 138 Fed., 559; *The Sciote*, Fed. Case No. 12,508, and notes).”

In *Ross v. Merch. & Miners Transp. Co.*, 104 Fed. 302, the Circuit Court of Appeals, First Circuit, said, by Circuit Judge Putnam, after discussing cases of vessels properly at anchor:

“But this appeal differs from each of the last two cases cited, in the fact that there the vessels injured were dredgers located at the places where it was necessary that they should be at work, while here the vessel injured was a barge, *not engaged in work and of light draft, so that she could easily have been anchored at some point clear from all possibility of endangering vessels proceeding up and down the channel.* The same rules of obligation to use care (that is, to avoid endangering the usual paths of commerce) apply, as apply with reference to obstructing any other highway unnecessarily.”

In *The City of Birmingham*, 138 Fed. 555, C. C. A. 2nd Circ., the Court says:

“The Courts should not encourage laxity and shiftlessness by rewarding a master who places his craft in a position of danger simply because it is too much trouble to place her in a position of safety.”

In *The Milligan*, 12 Fed. 338, the Court says:

“While the sloop was not lying upon the range of lights, she was *dangerously near* it, subjecting passing vessels to the exercise of unusual care. The position was not forced upon her; she might have anchored lower down. She would then have been out of the way and out of danger. Her anchorage so near the center of a narrow channel was inexcusable.”

(The same criticism applies to anchorage dangerously near the fairway of a regular ferry steamer.)

In *The Europe*, 175 Fed. 596, 607, Judge Wolverton says:

“It is a rule that a moving vessel must keep out of the way of one at anchor. This because the one at anchor is practically helpless, and is usually so conditioned as to be unable to relieve herself readily in stress of emergency. The rule is applied with great strictness, the vessel at anchor being in a proper place. In such case the presumption of fault lies against the vessel in motion. This presumption, however, does not obtain where the anchored vessel was where she should not have been. A vessel anchored where she should not be must take the consequences of her own improper act.”

The above cases show that the presumption upon which appellant rests its case has no application to this case.

III. THE COLLISION WAS CAUSED BY THE NEGLIGENCE OF THE "FULLERTON".

A. *Degree of care imposed upon the "Fullerton".*

In *The Ailsa*, 76 Fed. 868, a steamship anchored in a dense fog in a channel way, in improper place. The large steamer, *Bourgogne*, ran into her. Judge Brown said:

"The conclusion that the *Ailsa* was anchored much outside of anchorage limits, and right in the path of vessels seeking customary anchorage, *fixes upon her the primary responsibility for the collision, within the settled adjudications.*"

The "Fullerton", by her own evidence, remained in a situation where she was exposed to *danger of collision*; but it is settled that the duties of care which she owed to the "Transit", while she remained in the dangerous anchorage place, were of the highest order.

The precautions taken by a vessel anchoring in a dangerous position must be commensurate with the perils assumed.

In *The John H. Starin*, 122 Fed. 286 (C. C. A. 2nd Circ.) the Court said:

"The Courts have frequently held that the precautions taken by a vessel voluntarily anchoring in a dangerous position should be commensurate with the perils assumed," citing *The Clara*, 102 U. S. 200; *The Sapphire*, 11 Wall. 270, and other cases.

In *The Europe*, 175 Fed. 596, Judge Wolverton states the rule as follows:

“The rule is, as it respects a vessel at anchor in the fairway, that she must take precautions commensurate with the danger she presents to shipping. If the danger is great, the care to prevent collision and accident from other ships navigating the water should be correspondingly great. If of lesser moment, the precaution may be diminished accordingly.”

See also

The City of Birmingham, 138 F. 555;

The Clara, 102 U. S. 164.

B. *The precautions taken by the “Fullerton” were not commensurate with the perils assumed in a foggy night.*

a. *The “Fullerton” night watch was insufficient in foggy weather.*

While the “Fullerton” was lying in the fairway of the ferry steamer, she was left in charge,—in the day time,—of a watchman who was blind in one eye (Suppl. Ap. p. 61), and in the night time, of a young man, Robert Boyd Hemming, Jr., who was not a sailor, but acted as watchman and engineer. His functions were as follows:

A. Kept the lights clean and burning, rang the bell in case of fog; in case the wind should rise and there was danger of the ship dragging the anchor, letting go another anchor, or pay out more chain, and when the wind went down, take up an anchor, so as not to let the anchors get foul. (Suppl. Ap., p. 24.)

He was in charge of the engine, which naturally required some of his time in the engine room. He was also the lookout, which naturally required him to be out of the engine room. Even when everything ran smoothly, and there was no fog, there was enough work to keep a bright young man busy.

As far as the master was concerned, the only instructions he gave were:

A. He said one of us to keep the night watch, and the other the day watch on the vessel.

Q. Then you arranged it between yourselves that you were going to keep the night watch?

A. Yes. (Suppl. Ap., p. 31.)

In a foggy night, like the one in which the collision happened, this young night watchman and engineer was charged with too many duties to perform any of them with the care commensurate with the occasion.

In the thick fog which prevailed after 11 o'clock, one of the young man's duties was, as he was well aware, that "the bell has to be struck rapidly for about five seconds, at intervals of not more than a minute" (Suppl. Ap., p. 27). While he rang the bell, he was "on the fore-castle-head and the main deck, both, at different times" (p. 29).

Q. You did not stay in one place?

A. No, I was walking the deck.

Q. You were walking the deck? What were you walking the deck for?

A. To keep warm. (p. 29.)

It is thus clear that, in the foggy weather, before the collision, the young man had to move pretty lively to keep warm and also to keep his bell ringing and to act as lookout. These two occupations would have made it impossible for him to attend to his engine, if anything had gone wrong there. The engine was a gasoline engine, and the Court may take judicial notice of the whimsical nature of such an apparatus. Now, it appears that if anything had been wrong with the engine, it would have been the duty of the young man to quit his job at the bell and on the lookout, and to, presto! assume his job as engineer.

Q. If the engine had run irregularly, the engineer would undoubtedly have run down to the engine *and let the fog bell go for a while?*

A. *That would have been his duty.*

(Deposition of the Master, Ap., p. 161.)

When asked with reference to striking the bell:

Q. Could he do it in the engine room?

The master answers:

A. No, sir. (Ap., p. 162.)

The condition of affairs on board the "Fullerton" is thus described by the master:

Mr. HENGSTLER. Q. It is a fact, is it not, Captain, that he could not work the engine and bell at the same time?

Mr. FOULDS. Q. (Intg.) If anything had gone wrong?

A. I presume if he had to work the engine, he would call the other watchman.

Mr. HENGSTLER. Q. You presume?

A. Certainly.

Mr. FOULDS. Q. He could not do both at the same time?

A. *No, sir.* A watchman * * *

Q. You recognize, of course, there was a possibility of the lights going out, and that is the reason you had him there?

A. *He was there to look out for his engine, and to keep it in repair.* As a rule, * * * that night."

The day watchman's quarters were in the stern of the vessel; he was separated from the night watchman by the whole length of the vessel. He retired at 9 o'clock and went to sleep about half an hour before the collision (Suppl. Ap. p. 59). Obviously, some precious minutes would have been necessary if, in a fog, the engineer had called the night watchman away from the bell.

These facts show that the precautions taken by the "Fullerton" in case of heavy fog, and while she remained lying at anchor in a place where she had previously had narrow escapes of collision with the ferry boat, were not commensurate with the dangers which she assumed.

While she remained in that situation, ordinary prudence would have required that there should be two men on watch in a dense fog,—one to see to the engine and the lights, and the other to attend to the bell. Had a bulb blown up, or the gasoline engine put out the electric lights, these two men would have been extremely busy to keep the vessel

within the requirements of the law, as to lights and fog signals. One was plainly insufficient for such a purpose. Had the vessel burnt oil lamps, some excuse could be urged for having only one night watchman; for such lights are more reliable than electric bulbs, which depend for their efficiency on the notorious freaks of a gasoline engine requiring eternal watchfulness.

b. *The "Fullerton's" fog bells were not properly sounded.*

Judge Dietrich found that, "although the greater number of witnesses gave *negative* testimony in support of the libelant's contention that the 'Fullerton's' bell was not properly sounded, it is not sufficient to overcome the positive statements of the three men who were upon the 'Fullerton', to the effect that the bell was being rung in the manner required by the rules."

Apparently the learned Judge based this finding upon the superior weight ordinarily awarded to positive testimony as against negative testimony.

The testimony of the "Fullerton" witnesses is as follows:

The watchman, Robert Boyd Hemming, Jr., testifies:

It set in foggy around 9 o'clock and I only rang the bell a few times, and she lifted, the fog lifted; about 11 o'clock it started in setting in foggy, and I started in ringing the bell again. I heard the "Transit" approaching,

what I believed to be the "Transit" from her whistle. I kept trying to look out for her, and *kept striking the bell in between her whistles*, when I had a chance, so as to give somebody on her a show to hear it. It was not very long after I heard her whistle that I *saw the loom of her lights through the fog*, and when she was about three ship-lengths away, I could see both of her range lights, one immediately after the other. She was *approaching us on our starboard side just a little forward of amid-ship*, it seemed, from where I was. Then she seemed to turn and cross our bow, and if I remember rightly, I *heard two or three short blasts, like a short blast from a whistle*.

Q. Will you state whether or not you rang the bell during the time the fog prevailed after 11 o'clock?

A. Yes.

Q. How would you ring it, in what way?

A. I would ring it for about 15 to 25 strokes of the bell.

Q. What kind of strokes?

A. Ding-ding, ding-dong; like that.

Q. How often would you ring it?

A. About as near as I could judge, once a minute. (Suppl. Ap. p. 15.)

Q. How long prior to the time that you first heard her whistle had you been ringing the fog bell?

A. From quarter to half an hour, something like that, a little over, may be.

Q. Was there any time during that interval that you had not been ringing the fog bell?

A. Not that I remember of.

Q. Have you any recollection that you did ring it or did not ring it?

A. Yes, I rang the bell. (Suppl. Ap. p. 16.)

The day watchman, Olaf Olson, testifies, he turned in his bunk in the steerage aft at 9 o'clock:

I was laying reading in the bunk, just shortly before the collision I was going to sleep, I fell asleep.

Q. How long before the collision did you go to sleep?

A. I could not exactly—about half an hour. (Suppl. Ap. p. 59.)

His testimony as to the bell is as follows:

Q. Do you know whether or not the bell on board the "Fullerton" was ringing?

A. The bell on the "Fullerton" was ringing. (p. 57.)

Q. How often would you hear the bell of the "Fullerton's?"

A. The bell on the "Fullerton", about every minute was ringing. (p. 58.)

Q. You say you heard the bell of the "Fullerton" ringing that night?

A. Yes, sir.

Q. From what time on did you hear the bell ringing?

A. Well, the last time I was laying and reading in the bunk. (p. 60.)

It is submitted that this testimony does not show that the witness heard the bell of the "Fullerton" at any time during the critical moments before the collision.

The third man on board, the father of the night watchman and a visitor, had retired to his room on the starboard side aft at 9 o'clock and had gone to sleep.

Q. How long before the collision did you wake up from this click you speak of?

A. I woke up before the collision, maybe five or seven minutes; something like that.

Q. Could you hear any bells or whistles?

A. I could hear the fog whistle coming closer and closer to us.

Q. Did you recognize the whistle?

A. I think I recognized it.

Q. What did you think it was?

A. I thought it was the "Transit's" whistle.

Q. Did you hear any bells ringing at that time?

A. Yes, sir.

Q. What bells?

A. The "Fullerton's." (Suppl. Ap. p. 68.)

Q. Until how long before the collision did the fog bell of the "Fullerton" continue ringing?

A. The "Fullerton" seemed to be answering the blast of the steamer; I could not tell.

Q. What do you mean by that?

A. Well, if you are ringing a fog bell and you hear a steamer close by, every time she whistles you pull the bell, you kind of answer to make sure to satisfy her and yourself that she hears it so that she will go clear.

The testimony of the night watchman is that of an interested witness, and that of his father, who spent the evening on board as a visitor of his son, may be expected to be biased in favor of his son. These two are the only witnesses who give positive testimony on the subject.

In support of the contention that the "Fullerton" bell was not properly sounded, is the testimony of the witnesses for the "Transit". They

knew the approximate location of the "Fullerton" and were all watching for the fog signals of the "Fullerton". In the fog prevailing the sense of hearing was the only means of knowledge, assuming that the bells were sounded. When they did not hear the bells, they were justified in believing that they were too far north of the "Fullerton" to be in danger of collision with her.

Captain Higginson and the first officer were standing in the pilothouse, at an open window. The window was open "so as to see and hear" (Ap. p. 48). The first officer was "leaning outside of the pilot-house with his head to listen and see—to listen more than anything else" (Ap. p. 49). The second officer and four men were stationed on the main deck, "five on the bow right forward, in front of the cargo box cars" (p. 49).

The master testifies:

I was listening for bells, for knew that the "Fullerton" was there in some position somewhere, but we thought on account of not hearing her bells that we were far enough to the northward not to hear it. (p. 53.)

Q. But you did not hear the "Fullerton's" bell before the collision?

A. No.

Q. And I understand you were listening for bells?

A. *Distinctly; that is all we could go by, the sound.* (p. 53.)

The first officer of the "Transit" testifies:

Q. So that when you left the Oakland Pier on this 10:53 trip you had in mind the location

of the "Fullerton" with respect to your ferry slip, didn't you?

A. Pretty near it, yes. (Ap. p. 107.)

I was listening for any kind of noise. I had the window down and was leaning out of the window. (Ap. p. 89.)

Q. In your opinion if you had been on the bow of the "Transit" that night when it approached the "Fullerton" and the "Fullerton" had struck her bells, would you have heard them? *Would you have heard the bells?*

A. *Most undoubtedly.*

Q. Would you have heard them from the place where you were in the pilot-house if they had been struck?

A. Yes.

Q. You were hanging out of the window there and looking about, were you not?

A. Yes.

Q. And you were listening for bells?

A. Yes.

The second officer and four men of the crew were all on the lookout, in accordance with a rule in force on board of the ferry boat in case of foggy weather. They were all on the main deck, in the bow of the boat, looking and listening for signals.

Under the circumstances we submit that their testimony that none of them heard the bells of the "Fullerton", although they were straining their ears for them, is not of a negative character in the sense that it is inferior in weight to the testimony of a witness that he sounded the bell, or the testimony of another witness that he heard the bell. The principle applies here with peculiar force that,

“When a witness is in a situation to hear a sound, and, *listening*, hears none, his statement that he heard it not, or that it was not made, is as much the *affirmation* of the fact that there was no such sound, as would be the assertion by another witness in like situation, that the sound was made, an affirmation of that fact.”

Butler v. Metropolitan St. R. Co., 117 Mo. App. 354, cited in 2 Moore on Facts, Sec. 1197.

The principle is stated in Moore on Facts, Sec. 1198, as follows:

“Where positive testimony that signals were given is met by testimony in direct denial by witnesses *who could well have heard them* if they had been given, it is generally held that the latter testimony is *positive in character, equally with the former*,” citing many authorities.

This principle applies with particular force to the case at bar where, apart from the officers in the pilothouse, five men were specially charged with the *duty to listen* and to locate the “Fullerton” in the heavy fog, and where the “Fullerton” had the corresponding duty of making her location known by the only means in which it could be made known to other vessels, viz.: by sounding her bell vigorously.

The “Transit” witnesses testify that, before the collision they heard the sound signals from the ferry slip on Mission Bay, farther distant from

there than the "Fullerton", and the evidence shows that it was impossible to mistake the slip bell for the fog bell of the "Fullerton" (Ap. p. 86).

The attention of these seven witnesses was monopolized by the one effort to locate the "Fullerton" by her fog bell; they were in a far better position to receive accurate impressions of sounds from the "Fullerton" than the witnesses on the other side, two of whom were not listening for bells and had no direct interest in the signals. The "Transit" lookouts were watching keenly for signals, in the performance of a special duty. "In such situation no logical reason can be given for characterizing, in law, as inferior in value testimony based upon regular knowledge. The evidence that the bell was not rung was substantial" (The Court in the Butler case, *supra*).

It is respectfully submitted that, if the testimony given by the "Transit" witnesses be regarded as *affirmative* and *positive* in its character, and of at least equal value and weight as the testimony of the two interested witnesses of the "Fullerton", the Court should come to the conclusion that the overwhelming preponderance of evidence shows that the bells of the "Fullerton" were not properly sounded.

We also beg to call the Court's attention to the fact that there is no evidence whatever in the case to show how far the bells of the "Fullerton" carried, if worked by the rope system described by

the testimony of the night watchman, while he was walking on the forecastle or athwart-ship on deck, to keep warm. It is quite probable that a bell fastened to the foremast (Suppl. Ap. p. 28) does not emit its loudest sound, if worked from the forecastle head by a bell-cord at least 6 or 8 feet long (Suppl. Ap. p. 15), the lookout striking only the side nearest to him. It would stand to reason that the proper method of getting the kind of sound out of the bell which would have been commensurate with the danger of the situation of the "Fullerton", while lying in the fairway and in a dense fog, was to manipulate the clapper by a short rope from directly underneath the bell, by striking the bell rapidly from side to side. It is quite possible to find that the night watchman told the substantial truth as to his acts, but that the sound produced was not efficient enough to give warning to approaching vessels.

IV. THE NAVIGATION OF THE "TRANSIT" WAS WITHOUT FAULT.

We do not claim that the "Transit" after knowing that the "Fullerton" was in dangerous proximity to her fairway, had any right to navigate as if the "Fullerton" was not present. As a matter of fact the evidence shows that she was navigated with the greatest caution in view of that knowledge, and that every reasonable precaution was made to avoid collision with her.

The ferry boat had an undoubted right to make her run across the bay in a fog, especially as the fog was not dense when she left the Oakland side. The "Fullerton" knew that she would pass her, and knew that she had previously passed her, in a fog, on the southern side, although her usual track was on the north side of the "Fullerton".

The situation is practically a reproduction of the collision between a ferry boat and the "Cuyahoga", described by Judge Blatchford in

The Hudson, 12 Fed. Cas. No. 6829, as follows:

"These boats were entitled to their usual track in the ebb tide, as much in the fog as when there was no fog. Those in charge of the Cuyahoga were bound to know what such usual track in the ebb tide was, and what the effect of the ebb tide was on the manoeuvres of the boats in reaching their slip at Jersey City. The Cuyahoga had anchored where she was the afternoon before, and had seen the boats passing to and fro. There were two boats, each of which passed her once in every twenty minutes. Not that these facts would justify the ferry boats in reckless navigation in the fog, merely because such was their track in an ebb tide; for, they knew that the Cuyahoga was at anchor where she was. But, the existence of the facts referred to made it incumbent on the Cuyahoga to take all prudent measures to indicate where she was in the fog. Her general presence and her general position were known; but the fog prevented her being seen at any but a very short distance, and equally prevented a light on her being seen. *Any sound from her could, however, be heard through the fog; but it is clear it was so dense as to demand that the Cuyahoga should an-*

nounce herself by audible sounds. The ferry boat was blowing her steam whistle, and her paddles, she being a side-wheel boat, made a loud noise. The morning was still and calm. A sound on the water could be heard a considerable distance—much further than vision could penetrate through a fog. The approach of the ferry boat to the Cuyahoga was, therefore, indicated to the latter, and she should have responded by sounding a bell, or blowing a horn, or striking on an anchor-stock, or shouting with the voice, or making some other audible noise. She did nothing of the kind.”

The collision in the case at bar occurred at a time of night when no shipping ordinarily moves in the neighborhood of Mission Bay. The only danger which the “Fullerton” could reasonably expect was from the ferry which, on previous occasions, had nearly collided with her.

a. *The course and speed of the “Fullerton.”*

Course—The master of the “Transit” testifies:

We steer the same course year after year, day after day, month after month, right along, the ferry system. (Ap. p. 55.)

It is regularly southwest by south, modified, however, to some extent, to meet the requirements of winds and tides. On cross-examination, he says:

We figure a great deal on the strength of the tide when we run. If the tide is running very strong, we keep up a little here.

Q. Then the allowances you make would depend upon the character of the tide?

A. Yes, sir.

Q. When you run in the fog you have that uncertainty?

A. In fog you cannot make very fine calculations. It is according to how the tide is. (Suppl. Ap. p. 82.)

The watchman of the "Fullerton" knew the influence of the tide on the navigation of the ferry; it was, therefore, all the more incumbent upon them to give fog signals that were audible at a sufficient distance to enable the "Transit" to stop.

Speed—The captain of the "Transit" testifies that the steamer proceeded on her trip across the bay "under a slow bell, that is, *as close as we could shut her off without losing steerage way*, I should say, perhaps, 7 miles an hour; perhaps a little more, or perhaps a little less" (Ap. p. 47). "I have been running over 35 years at that average speed" (Suppl. Ap. p. 81).

In answer to Mr. Campbell's questions, he says:

Q. Don't you think she would maintain steerage way at four knots?

A. *No, sir*; but as I said before, I do not know the exact amount of knots. I know when she is going slow, and we do not keep a log as you do in deep water ships; we run these under slow or fast bell.

Q. You cannot tell me *in knots* how slow that vessel can go and still maintain steerage way?

A. *No, sir*. (Suppl. Ap. p. 81.)

Two things, therefore, appear from the captain's testimony: (1) that his vessel was running as

slowly as she could without losing steerage way; (2) that, although he guessed this was about seven miles, he does not know that. It would not be fair to build a mathematical argument on his estimate as to the number of miles an hour, for which he himself disclaims authoritativeness. The *fact* is that the "Transit" ran with the minimum speed necessary to give her steerage way. She employed no greater speed than was necessary to give her pilot proper control of her in the tide that was running. She could be stopped in an emergency inside of 800 to 900 feet (Ap. pp. 77, 78). This was all that was required of her by law, as the cases cited in appellant's brief show.

a. *The "Transit's" speed was proper.*

In *The Pennsylvania*, 17 Wall, 125 (appellant's brief, p. 12), the Court said, as to proper speed of vessels.

"It must depend upon the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others."

In *The Nacoochee*, 137 U. S. 330 (appellant's brief, p. 14), the rule is laid down that a vessel in a fog should

"maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog."

It is submitted that, in the last case, the remarks of the Court would express the rule more correctly if for the last words were substituted the words "which she should see *or hear* through the fog". The "Transit" had a right to assume that the "Fullerton" would sound her fog signals; her speed was within the prescribed limit, if she could have stopped her way as soon as she heard the "Fullerton's" fog bell. Had the fog bell been properly sounded, it could have certainly been heard at a greater distance than 800-900 feet. This is not a case where the uncertainties of sound in a fog play a part, for the continuous bell signal prescribed for a vessel anchored in a fog, if properly given, cannot fail to be heard in any fog.

In *The Martello*, 153 U. S. 64 (appellant's brief, p. 14), the Supreme Court held a speed from five and a half to six knots an hour to be excessive, on account of the *peculiar circumstances* of the case, and entirely within the rule of *The Pennsylvania*. The Court said:

"While it is possible that a speed of six miles an hour, even in a dense fog, may not be excessive upon the open ocean and *off the frequented paths of commerce*, a different rule applies to a steamer just emerging from the harbor of the largest port on the Atlantic coast, and in a neighborhood where *she is likely to meet vessels approaching the harbor from at least a dozen points of the compass.*"

Plainly, the case at bar is one where the moving vessel was "off the frequented paths of commerce"

—in quiet Mission Bay, where, in the middle of the night, she was, in all probability, the only moving thing and had no dangers to encounter except the vessel anchored in her fairway.

The authorities cited by appellant for the proposition that a vessel must proceed at such a rate of speed in a fog as to enable her to come to a standstill before she collides with a vessel which she can see, are predicated upon the assumed fact that the presence within the zone of risk of the vessel collided with has been known for an appreciable time. Otherwise the rule would lead to the absurd conclusion that if a vessel is anchored in a dense fog through which other objects could only be seen, say 10 feet ahead, an approaching vessel would be at fault if she moved at a greater speed than to enable her to come to a standstill within 10 feet. No vessel could be under control at so low a speed, and the dangers of collisions would be infinitely multiplied if ships were permitted, not to say required, to sail through dense fogs at such a rate. A vessel moving through the fog cannot (as appellant would suggest) be required to move so slowly as to enable her to come to a standstill before colliding with a vessel which hides in the fog and suddenly, and without warning, appears before her eyes. It is the duty of the latter vessel to make her presence known by signals; she cannot permit the moving vessel to approach through darkness or fog, or both, to a point where

she will be *seen*. The rule is correctly stated by Judge Morrow in

The Bailey Gatzert, 179 Fed. 44 (cited by appellant),

as follows:

“A rule applicable to such a situation was to proceed at such a rate of speed as would enable her, after *discovering* a vessel through the fog, to have stopped and reversed her engines in time to prevent a collision.”

She may be “discovered” by the sense of hearing as well as by the sense of sight.

The vessel at anchor has the reciprocal duty *to enable the approaching vessel to discover her*—in clear weather, by exhibiting proper lights, in foggy weather, by sounding proper signals. Surely, if the electric lights of the “Fullerton” were only able to penetrate the dense fog for a distance of, say 25 feet, it could not be claimed that the “Transit” was at fault if she was not able to come to a standstill within the 25 feet after she could see the electric lights. Had the “Fullerton” struck an efficient bell for five seconds, at short intervals, so that the same would have carried 800-900 feet, the “Transit” could have come to a stop in time to prevent a collision. This is all that the cases cited by appellant required of her. If, for any reason, the “Fullerton” failed to indicate her presence to a vessel 800-900 feet away, she was clearly at fault.

b. *The speed was immaterial, as it did not contribute to the accident.*

Assuming that the "Fullerton" did not give proper fog signals, the collision would have occurred even if the "Transit" had proceeded at a speed of 3 or 4 knots per hour. It might have been postponed a few seconds; but evidently the fog was so thick that all the six men on the "Transit", although straining their eyes for the "Fullerton's" lights, could not discover them until it was too late to avoid a collision.

When the "Fullerton's" light was discovered, the fog was so dense, it could not be seen more than a couple of hundred feet anyway. * * * it might have been 200 feet, or it might not have been that much. (Ap., p. 75.)

Q. When you first perceived the light of the "Fullerton", Captain, how much time elapsed from the moment when you first perceived the light to the time when the vessels came together, in your opinion, generally?

A. *It might have been 20 seconds; it might have been 30 seconds.* It was a very short time, I know that is all. (Ap., p. 83.)

Again he says:

There was not distance to do anything; there was not time to even back the engines without endangering the lives of the engineers.

Q. If the engines had been reversed, would that have made any difference?

A. Not a particle. I don't believe they would have reversed; they might have. (Ap., p. 84.)

The evidence of Reichelt, first officer, is to the same effect:

A. It was only just about 2 or 3 minutes after (that) we heard the sound of the slip-bell that we located, our second officer reported a bright light on our port bow right on board, and immediately after the report was given I could see the bright light almost with the level of the pilot house, about 3 or 4 points on my port bow. I was on the port side, it was nearest to me, and almost on a level with the pilot house windows.

Q. How near was it in a general way?

A. Well, that is pretty hard to tell how near it was, but the distance was *very short*, I should say about 150 feet, maybe a little more, and it might be a little less; it is a pretty hard thing in a fog, in a dense fog like that, to gauge the distance within a few feet. (Ap., pp. 91, 92.)

The Captain, he put his helm hard-aport and gave them the jingle-bell, and in the meantime when he gave them the jingle-bell, I seen the bowsprit of the "Fullerton" coming right for the pilot house, and I told the Captain, I said, "for God's sake, stop your engines entirely". We were right square across the "Fullerton's" bow, or the vessel's bow. I didn't say the "Fullerton's" bow, but the vessel's bow, and he gave them two bells in the engine room; that means for to say to stop. Then the time was so short that I dont think the engineer had time to give half a turn or quarter of a turn on the engines. (Ap., pp. 91, 92.)

Assuming now that the "Transit" could, and would have traveled only four knots an hour, the situation was such that the vessels would have come together anyway; in other words, her speed was not a contributing cause. Appellant seems to con-

tend that, if the "Transit's" steerage way cannot be reduced to a rate of speed which would have made this collision impossible, her owners should cease running her in a fog. It is well settled that the large ferries necessary to carry on the traffic of a port like that of San Francisco have a right to run in a fog, and it must be remembered in this connection that, when the "Transit" left her Oakland slip, the fog was light. What could she have done when she entered into the dense belt on this side of the bay? The chances of colliding with other vessels were obviously minimized by her continuing her course under steerage way. If the "Fullerton" had given her people warning, by sounding her fog signals, the collision would have been avoided. Her speed was not a factor in the collision.

c. If there was error in the manoeuvres of the "Transit", the rule in extremis applies.

We have shown that when the "Transit" lookouts first saw the light of the "Fullerton", a situation of extreme danger had arisen. It is impossible to say with certainty that his first order, then given, to port the helm and go ahead full speed was a mistake; for, as the vessels came together, the "Transit" would have struck the hull of the "Fullerton" on the starboard bow, had she not promptly ported her helm—evidently under the first impression that there was time "to make the boat swing past her" (Ap., p. 52). When the captain of the "Transit" saw that he was too close, "I

knew the best thing to do would be to stop the boat entirely” (Ap., p. 52). Judge Dietrich held the view that he was not warranted in the conclusion that there was a want of care in the navigation of the “Transit” immediately prior to the collision. But even if it were otherwise, the rule *in extremis* clearly governed the situation. The words of the Court in

The Queen Elizabeth, 122 Fed. 406, 409 (C. C. A., 2nd Circuit), apply:

“When the master of a vessel is confronted with a sudden peril, caused by the action of another vessel, so that he is justified in believing that collision is inevitable and he exercises his best judgment in the emergency, his action, even though unwise, cannot be regarded as a fault. ‘The judgment of a competent sailor in extremis cannot be impugned.’ *The Oregon*, 158 U. S. 186, 204; 15 Sup. Ct. 804; 39 L. Ed. 943. It is the duty of the Court, as far as possible, to place itself in the position of the master and to endeavor to interpret the rules of navigation in the light of the perils and perplexities which surrounded him at the time—the impending danger, the excitement of the moment, the necessity for immediate action. Where a navigator of experience and good judgment acts, in such circumstances, his action, if within the limits of reasonable judgment and discretion, cannot be imputed to his vessel as a fault. If he acts upon his best judgment at the time, it is sufficient even though subsequent judicial investigation may show that he might have chosen a more prudent course. A master who the next moment may be sinking with his ship and crew cannot be expected to display the utmost coolness and

deliberation. The *Dimock*, 23 C. C. A. 123, 77 Fed. 226; The *City of Augusta*, 25 C. C. A. 430, 80 Fed. 297; The *Iron Chief*, 11 C. C. A. 196, 63 Fed. 289; The *Havana* (D. C.), 54 Fed. 411; The *Robert Healy* (D. C.), 51 Fed. 462."

It is hardly necessary to answer appellant's argument that the "Transit" violated Rule 16 of the Inland Rules. Clearly this rule does not apply to the case at bar, because the evidence shows overwhelmingly that the "Transit" did not hear the fog-signal of the "Fullerton". We contend that the evidence shows by great preponderance that the fog-signal of the "Fullerton" was not sounded properly and that this is the cardinal fact causing the collision.

Appellant's argument that the "Transit" was negligent in not stopping and reversing her engines the moment when the "Fullerton's" light was seen, has been answered. The manoeuvres of the "Transit" after that moment were acts *in extremis*. She was prevented from taking timely measures to prevent collision by the "Fullerton's" failure to give fog-signals.

It is difficult to understand the argument of appellant criticising the master for "not devoting his undivided attention to the duty of master in her navigation", in view of the facts of the case. How could the master better devote his attention to the navigation of a ferry than by personally keeping his hand on the apparatus by which the whole navigation of the boat is every instant con-

trolled? If he had been away from the post of the pilot; if he had been in any other place except at the helm and had, in the dense fog, entrusted his boat to the navigation of a subordinate, the criticism would be justified. But he was at the most critical post where instant action may at any time be required, and in a situation where critical seconds are saved which would be lost if his will had to be first communicated by orders to a subordinate. He had had experience as a master of ferry boats on this bay for thirty-three years, and could not have fulfilled his duty more perfectly than by assuming personally the most critical post in the navigation of the boat. In that post his attention is not monopolized by the compass before him, although he steers by course; his eyes have still abundant time to attend to lights or objects in or near his course. He was stationed in the one position where he could, in an emergency, give immediate signals to the engineer in charge. Seconds of great importance, which would in any other position have been lost, were saved by the fact that he was and remained in the critical post.

On this point the language of the Court in

Wright & Cobb Lighterage Co. v. New England Nav. Co., 189 Fed. 809, 814 (S. D. N. Y.), a case of a collision between the ferry-boat "Pierrepont" and a moored barge in New York harbor, applies to the facts of this case:

"I cannot see that the Pierrepont was guilty of any fault. Ferry boats cannot tie up in a

fog. Public interests require that they should make their regular trips even in very thick fogs. On this trip the *Pierrepont* was navigated carefully and prudently. The Captain, a licensed pilot of long experience, was at the wheel. * * * He proceeded slowly, sounding fog signals. * * * He knew substantially where he was. He could hear the big bell rung in fogs off the ferry entrance. * * * The fog was so dense that the light on the float could not be seen until it was so near that a collision could not be avoided. No one on the *Pierrepont* heard any bell on the New Haven tug. I think it doubtful whether any was rung. If rung, it was admittedly a small bell, and was not heard. In short, I see no ground for any charge of fault in the *Pierrepont*. The masters of New York ferry boats are generally experienced pilots, and careful, faithful men, who have surprisingly few collisions in view of the crowded condition of the harbor. They have to run in fogs; and there is no justice in holding them responsible for collisions in thick fogs when they have done their best."

It is respectfully submitted that the evidence shows affirmatively and by great preponderance, that the "*Transit*" was without fault, and that she could not have prevented the collision by the exercise of care, caution and maritime skill. The evidence also shows by overwhelming preponderance that the "*Fullerton*" remained lying at anchor in the fairway of the "*Transit*", although she had received distinct warnings of the dangers which she defied; and that her fog-signals were, if sounded at all, not sounded in such a manner as to be audible

to an approaching vessel so as to enable the latter to avoid her. The "Fullerton" was solely responsible for the collision.

We therefore respectfully submit that the decree of the District Court, dismissing the libel of cross-appellant, should be reversed, and that the cause should be remanded to the District Court with instructions to enter a decree in favor of libelant and cross-appellant, Southern Pacific Company, and against cross-libelant and appellant, Mission Transportation and Refining Company, in such sum, with interest and costs, as libelant and cross-appellant shall prove to have been damaged by reason of the collision between the said ferry steamer "Transit" and said barkentine "Fullerton", together with such other and further relief as in law and justice said libelant may be entitled to.

San Francisco, October 25, 1913.

Respectfully submitted, *E. J. Foulds,*

LOUIS T. HENGSTLER,

Proctor for Cross-Appellant.

No. 2262

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MISSION TRANSPORTATION AND
REFINING COMPANY (a corpora-
tion), claimant of the Barkentine
"Fullerton", etc.,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY
(a corporation),

Appellee.

REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE.

The faults charged by appellee and cross-appellant in its reply brief against the "Fullerton" are three, viz.:

Improper anchorage, insufficient night watch, and failure to ring the required fog bell.

THE ANCHORAGE OF THE "FULLERTON".

It is contended that the "Fullerton" was improperly anchored in that she was within the "fairway" of the

“Transit”, though the positive assertion is not made that she was anchored within the forbidden anchorage zone. To lay a foundation for such contention, proctors for appellee of necessity inferentially cast aside, as unworthy of acceptance, the testimony of the “Fullerton’s” witnesses as to the anchorage of their vessel, indicated by the locations made upon the chart offered in evidence, because, as proctor states it,

“These witnesses are all interested in locating the anchorage place of the ‘Fullerton’ as far away from the forbidden anchorage ground established by the State Harbor Commissioners as possible”.

It is true that each witness placed the anchored position of the “Fullerton” at a different point, but their very failure to agree demonstrated an independency of judgment and honesty of purpose in their efforts to point out her position. If, after the period intervening between the collision and date of trial, each witness had indicated the same position upon the small scale government chart, it might well have been viewed with suspicion. But not so, when the men, all present in the court room while the others testified, frankly disagreed in their designations upon the chart.

The point is that though the witnesses may have disagreed as to the exact place of anchorage, that is distance and direction off shore, say from the ferry slip, they were in accord upon the fact that she was to the south of the southern boundary of the forbidden anchorage zone, and was, at the time of the collision, and had been for three months previous

thereto, in the same position within permitted waters. Nor is there an iota of evidence in the record to the contrary, for *the bearing of the "Fullerton", claimed to have been taken by the master of the "Transit" three or four days prior to the collision, corroborates the fact that she was not within the forbidden zone.* This is impliedly admitted by proctor, for he states in his brief (p. 10) that the theory of the "Fullerton" seems to be that she was without fault as long as she was not actually in the zone of forbidden anchorage, and that all waters not forbidden are permitted waters.

The master of the "Transit" testified that three or four days prior to the collision, he took the bearing of the "Fullerton" and ascertained that she lay *east northeast from the ferry slip, 1000 yards off.* Though she had been anchored in the same place for the three preceding months, the master refused to admit that he had ever noticed her presence except during the three or four days before the collision. He explained this on the theory that she had during that time drifted from a previous anchorage to within that distance from the established fairway, though all of the witnesses on the "Fullerton" testified that she had not materially altered her position from the time she first dropped anchor. It is pertinent to inquire how the master of the "Transit" knew of her alleged drifting, if he did not know of her earlier anchorage?

The bearings claimed to have been taken by the master, when laid down upon the chart, show the position, east northeast and 1000 yards off the slip, to

be, as nearly as can be measured, 1000 feet south of the southern boundary of the forbidden anchorage zone (see chart appended). With the "Fullerton" 235 feet long, anchored with sixty fathoms of chain, one thing is thus demonstrated, on the testimony of the "Transit's" master, to say nothing of the "Fullerton's" witnesses, and that is that *when the "Fullerton" swung to the flood tide on the night of the collision, she was not within 1000 feet of the fairway established by the State Board of Harbor Commissioners.* Nor do proctors for appellant make contention to the contrary, for in their libel, drawn nearly nine months after the collision, no charge is made that the "Fullerton" was anchored within the forbidden zone.

How, then, can it be urged that the "Fullerton" was improperly anchored? It is true that certain of her witnesses testified that *sometimes* the "Transit" would pass close to the "Fullerton" when the latter was lying to an ebb tide, *i. e.*, with her stern toward the fairway, but that fact does not establish that the "Fullerton" was improperly anchored at the time of the collision, for to pass so close to the "Fullerton", it is manifest, on her master's testimony, that *the "Transit" must then have been without her fairway, to the southward of the forbidden anchorage zone.* That her navigation was erratic in this respect is shown by the fact that once she crossed the "Fullerton's" bow on the ebb tide (Supp. Apostles pp. 17-18); sometimes on a flood tide she likewise came close to the "Fullerton" (Supp. Apostles p. 17), whereas usually on a flood tide, such as was prevailing at the time of the collision, she passed

a mile to the northward (Apostles p. 145). Whether ebb or flood, the "Transit" apparently followed no defined approach to the slip, even consistent with the prevailing tide.

Examination of the chart (Claimant's Exhibit 2), a copy of which, with notations thereon illustrative of argument, is appended hereto, will show that the forbidden anchorages were established by the Harbor Commissioners largely as lanes for the ferries traversing the bay, and those passing along the San Francisco water front. One forbidden zone protects the ferry running from the slip at Point Richmond (Santa Fe Ry. Co.) to the main ferry slip on the San Francisco water front; another from the Key Route (S. F., O. & S. J. R. R.), Southern Pacific mole (S. P. R. R. Co.), Western Pacific mole (W. P. Ry. Co.) and Alameda mole (S. P. R. R. Co.) to the main ferry slip at the Ferry Building; a third forbidden anchorage is that protecting the ferries running to the Berry street wharf, and the 16th street wharf to which the "Transit" was bound at the time of the collision; a fourth was established three days after the collision, though the Harbor Commissioners' charts were not published until March, 1910, following the completion of the new Western Pacific slip at the southerly end of the water front. Thus, ample lanes of travel across the bay and for 500 yards out from the wharves along the water front, were established, at the time of the collision, within which no vessel was permitted to anchor. The fairway so set aside for the use of such ferries as might transport freight to the 16th street

slip, was bounded on the south by a line extending from the wharf approximately 300 feet south of the slip, in a general northeasterly direction to the Alameda mole and, on the north, by a line from the entrance to Oakland Creek to a point on the San Francisco shore known as Hay wharf, three-quarters of a mile to the northward of the slip, and having a width of 4500 feet opposite the point where the "Transit's" master located the "Fullerton".

Such a fairway, however, so goes the argument of proctor, was not sufficient for the "Transit", as he asks the court to hold the "Fullerton's" position improper because the "Transit" did not keep within this lane, three-quarters of a mile wide, but sometimes, on flood as well as on ebb tide, passed close to the "Fullerton", a thousand feet outside of the established fairway. To condemn the "Fullerton" as being improperly anchored, they would thus have the court *add* to the broad fairway, already established by governmental authorities, such further zone as the "Transit" was sometimes carried into by her erratic navigation.

Such additional width to the southern side of the forbidden zone was unnecessary for manifest reasons, as the fairway extended far enough to the northward ($\frac{3}{4}$ of a mile) to allow the "Transit" an unobstructed opportunity to keep up against a flood tide, so as to overcome the southerly drift of such tide as she crossed from Oakland to her San Francisco slip. On an ebb tide, the drift would be to the northward, and as the "Transit" crossed from Oakland to the

slip, she would be forced to run against the tide, as the Oakland mole, from which the ferry started, was to the northward of the 16th street slip. Thus, in crossing to the slip, on an ebb tide, the "Transit" was in no danger of being carried by the tide to the southward of a line drawn from Oakland to the slip. On the contrary, she would be carried to the northward, and, by stemming the tide, could make the slip without being forced to the southward of the fairway. The location, by the Harbor Commissioners, of the southern boundary of the fairway, 300 feet to the southward of the slip, was, therefore, sufficient to enable the "Transit" to reach the slip on the ebb tide. If she went beyond that line, it was voluntary on her part, and not required by any of the exigencies of navigation on such a tide. If, then, sometimes on an ebb tide, the "Transit" came close to the "Fullerton", anchored to the south of the fairway, it was not because she did not have ample room to make her slip, but because of erratic navigation.

On the other hand, a flood tide naturally drifted her to the southward, and, to give her opportunity to overcome its influence, the forbidden anchorage was extended far to the northward of the slip, so that, in laying her course from Oakland mole, the "Transit" had an unobstructed fairway to keep to the northward, and thus offset the southerly set of the tide. It was for the purpose of offsetting the drifting effect of the flood tide that the "Transit's" master ordinarily laid his course S. W. by S., and on the trip of the collision S. W. $\frac{1}{2}$ S., from Oakland mole, thus demonstrating the practical

wisdom of the Harbor Commissioners in laying out the fairway with its greatest area of forbidden anchorage to the northward of the slip.

Were any of the places from which the "Transit" always departed on the Oakland shore, to the southward of the slip, or even opposite it, it is at once apparent that the fairway would have required extension to the southward, but situated as they were, to the northward, the Harbor Commissioners correctly laid out the fairway when they located the greatest area of the forbidden zone to the northward of the slip. In this manner, they provided an ample and safe fairway for the "Transit's" approach to the 16th street slip, whatever the tide might be.

There was, then, no reason so far as the necessities of the "Transit's" navigation were concerned, why the fairway set apart for her use was not sufficient, or why the anchorage of the "Fullerton" was not proper at the time of the collision, even granting that she was within the distance of the forbidden zone testified to by the "Transit's" master. Had the anchorage of the "Fullerton" been deemed a menace by those on the "Transit", if properly navigated, or imperiled the safety of the "Fullerton", certainly some warning would have been given by the "Transit" to the "Fullerton", or some complaint thereof made to the proper harbor authorities. But not a word.

The fact that on an ebb tide the "Transit" sometimes voluntarily came close to the "Fullerton", outside of the forbidden zone, is no reason for holding that

the latter was there improperly anchored. If so, then the establishment of the forbidden anchorage was meaningless, as the proper anchorage would be determined not by authorities having supervision of the harbor, but by the erratic navigation of the "Transit".

It is respectfully submitted that a fairway having been established by the Harbor Commissioners, within which anchorage is forbidden, and without which anchorage is permitted, a vessel is not to be condemned for anchoring without the forbidden zone, because a ferry, having the privilege of the fairway, sees fit to leave the lane established for her benefit and voluntarily pass close aboard the anchored vessel. The establishment of the fairway, within which the ferries might pass without encountering anchored vessels, equally conferred upon all other vessels anchored without the zone, the same privileged character. Expressly barred from anchoring within long established areas, designated by rules and published charts as "forbidden anchorages", ample for their purposes, it necessarily follows that the waters outside such forbidden zones were proper anchorages.

The Ophelia, 44 Fed. 941.

The fact, then, as urged by proctor, that *sometimes*, which is not shown to have been confined to the two or three days prior to the collision within which the master of the "Transit" would only admit having knowledge of the "Fullerton", the "Transit" passed close to the "Fullerton", does not establish the improper anchorage of the "Fullerton", so as either to condemn her, or

to bring her without the operation of the rule raising a presumption of fault against a moving vessel in collision with one that is anchored.

THE PRESUMPTION OF FAULT.

The cases relied upon by proctors to remove the "Transit" from a presumption of fault for having collided with the anchored "Fullerton", are based upon facts manifestly dissimilar to those in the case at bar, and formulate no rule which can be invoked against the "Fullerton".

For instance, the "Talisman", in

The D. S. Gregory, Fed. Cas. 4102,

was not condemned, though she was about in the usual track of ferry-boats crossing the Hudson River, *as she was not within a forbidden zone*. Her position being known to the ferry, the court held that it was the latter's duty to keep clear.

In

The Bedford, Fed. Cas. 1216,

the anchored schooner was condemned, however, *because she was anchored within a forbidden zone established by an ordinance of the City of New York, forbidding anchorage within 60 yards of a direct line between the landing places of the public ferries traversing the river, regarding the unlawful character of which anchorage she had been previously warned by the master of the colliding ferry*. In the case at bar, the established fairway was 4500 feet wide opposite the anchor-

age of the "Fullerton", and the latter was over 300 yards outside of it.

In

The Rockaway, 19 Fed. 449,

the brig "Survivor" was not condemned, *because she was anchored within permitted waters*, although she was within 150 yards of a forbidden zone.

In

Graves v. Carferry Transportation Company, 183 Fed. 378,

cited by appellee, *no forbidden zone had been established*, but the court expressly found that the schooner "Wilson" was improperly anchored in a *navigable channel*, and was not displaying the lights required by law. The case is not in point with the one at bar, for here a broad zone was specially set aside for the use of the ferries, outside of which the "Fullerton" was anchored, a situation entirely different from that of improperly anchoring a vessel in a navigable channel. And, even in that case, there was a strong dissent on the part of one of the judges of the court of appeals.

Proctor also cites the case of

Ross v. Merchants & Miners Transportation Company, 104 Fed. 302,

in support of his citation that no presumption of fault is to be raised against the "Transit". Examination of the facts readily show that the scows were moored together in a string and anchored so close to a *narrow channel* that the incoming tide naturally threw *them*

across the middle of the channel. The court remarked in the omitted portion of the excerpt quoted by proctor:

“With reference to vessels at anchor, where properly anchored, the rule is strict in their behalf, but as to positions for anchoring there is no mystery. The same rules of obligation to use care (that is, to avoid endangering the usual paths of commerce) apply as apply with reference to obstructing any other highway unnecessarily.”

Had the “Fullerton” been anchored in, or so that she swung into, the forbidden zone, then she would have been subject to the rule by which the scows were condemned for being anchored where they swung across the narrow, dredged channel. But the very fact that the “Fullerton” was admittedly out of the established fairway, makes applicable to her case the rule which the court recognized when it said that

“with reference to vessels at anchor, where properly anchored, the rule is strict in their behalf
* * *”

Similar facts also distinguish

The City of Birmingham, 138 Fed. 555,

for the dredge was held in violation of the Act of Congress, March 3, 1899 (U. S. Comp. St. 1901, p. 3543), making it unlawful for vessels to anchor in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft, as it was found by the court to have been so anchored in a part of a navigable channel, at best difficult of navigation, as to obstruct the passage of other vessels. It was not the case of a vessel anchored in a large navigable bay

beyond the boundaries of long established fairway, sufficient in width for vessels carefully navigating it.

So with

The Milligan, 12 Fed. 338.

She was anchored slightly off the center of, but still within, a narrow navigable channel.

We respectfully submit, therefore, that, with the "Fullerton" anchored out of the established fairway, there is nothing to justify her condemnation as improperly anchored, or to remove the "Transit" from the presumption of fault raised against her for having come into collision with the anchored "Fullerton".

THE WATCH ON THE "FULLERTON".

It is said by proctor that the duties of care imposed upon the "Fullerton" were of the highest order. We, of course, admit that a proper lookout was required to be maintained, sufficient lights kept burning, and the fog bell rung as prescribed by law. The cases cited by proctor, however, lay down no rule which would condemn the "Fullerton" as in failure of full compliance with those obligations.

The Ailsa was held in fault because of her anchorage in the channel for steamers bound out of the port of New York, and in *The John H. Starin*, the responsibility for the collision was found to be with the schooner, in that she failed to maintain the lights and lookout required of vessels anchoring in the center of the channel

usually taken by all New York steamers leaving New Haven harbor.

The rules, as stated in *The Europe*, *The City of Birmingham* and *The Clara*, are unquestioned when the facts make them applicable, but there is nothing in any of them which points to a fault on the part of the "Fullerton" in the fulfillment of the obligations imposed upon her. On the contrary, the evidence shows affirmatively the proper performance of every duty. In his effort to find some fault on the part of the "Fullerton", proctor indulges in general criticisms of a petty character of the watch maintained, which are unsupported by any facts shown in the record. For instance, much is said about the day watchman who suffered from the misfortune of being blind in one eye, the youthfulness of the man on watch at the time of the collision, the character of his duties, the whimsical nature and fitness of a gasoline engine, the unreliability of electric lights, etc., etc., but the fact remains that the "youthful" watchman was 25 years of age, had been to sea for over four years, and proved himself of qualifying experience and intelligence for the duties he was called upon to perform. Criticism is likewise made of the fact that he might have been compelled to call the other watchman if certain things had happened which did not occur, a matter entirely foreign to the question of contributory fault. Withal, however, the record clearly establishes that the lights were continuously displayed, and that the watchman was alert and adequately performed the duties resting upon him.

There remained but one other act to constitute a complete fulfillment of the obligations imposed upon the "Fullerton" as an anchored vessel, to wit, ringing the fog bell. If that was done, then certainly she was not guilty of any fault which even remotely contributed to the collision.

THE "FULLERTON'S" FOG BELL.

Proctor makes strenuous effort to avoid the effect of the District Court's finding that the positive proof of the ringing of the "Fullerton's" fog bell was not overcome by the negative testimony of those on the "Transit", who asserted that they did not hear it, by contending that what the court characterized as negative testimony, was, in fact, positive, and was, by reason of a larger number of witnesses, of greater weight. *Moore on Facts*, Sec. 1198, is cited to support the contention. A reading of the author's statement in its entirety will show, however, that it does not lay down the principle asserted by proctor, that the direct denial by witnesses who could well have heard signals if they had been given is generally held to be positive in character, equally with the positive testimony that the signals were given, but the author does say that the denial testimony is positive in character equally with the testimony that the signals were given, *so as not to justify taking the case from the jury.*

Furthermore, the author, in the section from which proctor's excerpt was taken, was discussing land signals,

to wit, locomotive and electric car signals (see page 1340), and not fog signals. Of the relative weight to be given positive and negative testimony of fog signals, the author states a different proposition to that quoted:

“Upon the disputed question whether a vessel’s signals were given—fog horn, bell or whistle—very little weight is ever given to testimony that they were not heard, when opposed to positive testimony by credible witnesses in position to know the facts. * * *.” (Section 1194a.)

It follows, therefore, that the District Court contravened no principle of law when it found that

“although the greater number of witnesses gave negative testimony in support of libellant’s contention that the ‘Fullerton’s’ bell was not properly sounded, it is not sufficient to overcome the positive statements of the three men who were upon the ‘Fullerton’ to the effect that the bell was being rung in the manner required by the rules.”

Such finding of fact having been made, it will not be disturbed by this court under the well known rule stated in

The Bailey Gatzert, 179 Fed. 44, 48.

In his effort to get away from the District Court’s finding, proctor endeavors to adduce from the record that but two, not three, witnesses gave positive testimony of the ringing of the bell. The evidence which he would discard is that of the day watchman, Olson, for, after quoting the witness, proctor concludes that the testimony does not show that the witness heard the bell of the “Fullerton” at any time during the critical moments before the collision.

The injustice of such conclusion quickly appears from the reading of the entire testimony of the witness. What the witness was referring to in the meagre part quoted by proctor was the time from which he heard the fog bells of the "Fullerton." That proctor so understood was manifest from the following question which he subsequently propounded to the witness:

"Q. From 9 o'clock on you heard the bell on the 'Fullerton', did you?

A. Once in a while.

Once in a while foggy and once in a while clear."

(Supp. Apostles, p. 60.)

His testimony on direct examination, however, shows how unmistakably the witness heard the "Fullerton's" bell as the "Transit" approached:

"Q. Do you know whether or not the bell on board the 'Fullerton' was ringing?

A. The bell on the 'Fullerton' was ringing.

Q. Was ringing?

A. Yes, sir, was ringing.

Q. What noise did you hear when you awakened?

A. The noise from the 'Transit' paddle-wheels and the whistle.

Q. How often would you hear the bell of the 'Fullerton's'?

A. The bell on the 'Fullerton', about every minute was ringing.

Q. Did you see the 'Transit' at all?

A. Seen her. I looked out through the port hole.

* * * * *

Q. Are you positive, or is it merely a matter of guesswork that the 'Fullerton's' bell was ringing in that fog?

A. The 'Fullerton's' bell was ringing."

(Supp. Apostles, pp. 57-59).

The fact, as established by the record, is that the "Fullerton's" bell was sounded, and the circumstances all point to its having been heard and mistaken by those on the "Transit". Indeed, proctor makes no attempt to reconcile the statement of the "Transit's" master that while he usually heard the slip bell 6 or 7 minutes off, this night he heard it 15 minutes distant, and that while he could only hear the slip bell when straight out from the slip, this night, if heard 15 minutes off, the sound must have reached far to the northward, on the course (S. W. $\frac{1}{2}$ S.) the "Transit" was steering. Proctor makes no explanation of the fact that the master heard the "bell" right straight ahead while steering S. W., and that shortly afterward the "Fullerton's" light was observed in the same direction, a course, as shown by the appended chart, which could not have made possible the hearing of the slip bell in the direction from which the sound of the ringing bell came. Nor does proctor have a word to say as to why the slip bell, if ringing immediately before the collision, was not heard afterwards, though the "Transit" had not reached the slip, and at the point of collision was admittedly nearer the slip than when the bell was first heard. The slip bell was not heard on the "Fullerton" (Supp. Apostles p. 17) although she was more in range and closer to it than the "Transit" could have been when 22 or 23 minutes out from Oakland. If it were rung, why was the employee of appellee not called to testify to the fact, and explain the reason for its ceasing on the happening of the collision?

These facts, coupled with the positive testimony of those on board the "Fullerton" that the bell was rung, conclusively demonstrate as circumstances can, that the "Fullerton's" bell was heard, but mistaken, doubtless because those on board the "Transit" erroneously assumed that they were farther to the northward, beyond the range of the "Fullerton's" bell.

Such testimony and such circumstances cannot be answered by the suggestion, apparently original with proctor, for it finds no support in the record, that the bell was rung by the wrong kind of a cord, or that the distance at which the bell could be heard was not established. The type of bell, its arrangement and the manner in which it was rung, was fully described, but its efficiency was unquestioned on the trial.

In the light of all the facts, therefore, no fault on the part of the "Fullerton" is to be found, but, on the contrary, she was complete in the fulfillment of every duty imposed upon her as an anchored vessel.

**RESPONSIBILITY FOR THE COLLISION RESTS UPON THE
"TRANSIT".**

We confess our inability to see wherein *The Hudson* (F. C. 6829), cited by proctor, is decisive. There, the Revenue Cutter "Cuyahoga" was held in fault for not giving the fog signal required by law. She was anchored in too close proximity to what was, on the ebb tide, the usual route of the colliding ferry in making her slip. There was not, as in the case at bar, any

fairway for the ferries, established by governmental authorities, outside of which the "Cuyahoga" was anchored. Then, too, she was repeatedly warned by the ferries of the danger of her position, which requests to move were met by insulting refusals even after one collision had occurred. None of the faults which condemned the "Cuyahoga" are to be attributed to the "Fullerton".

It is unnecessary to further comment upon the excessive speed of the "Transit", except to point out the fallacy of the reasoning by which proctors seek to escape condemnation for a speed, which not only has been condemned as excessive *per se*, but which was in violation of every reason upon which the rule against immoderate speed is based. It may be true that the master steered the same course that night which he had for 35 years, but that in no way granted him the right to run at an immoderate speed, for though he knew he had a broad fairway, the fact that he brought up on the "Fullerton", to the southward of the fairway, when he thought he was far to the northward of it, shows how unadvised the master was as to the actual course of the "Transit".

If the rules laid down in *The Pennsylvania* and *The Martello* are to be applied, the "Transit's" speed was, *per se*, excessive. Proctor, however, makes a valiant effort to escape the effect of *The Martello* by suggesting, in effect, that while the Supreme Court held a speed of five and a half to six knots excessive, on account of the *peculiar circumstances* of the case, it is inapplicable to the case at bar because the "Transit" was

“off the frequented paths of commerce, in quiet Mission Bay, where, in the middle of the night, she was, in all probability, the only moving thing and had no dangers to encounter except the vessel anchored in her fairway.”

We may search the record in vain for any evidence to support the declarations of proctor. For all that appears, and it is as likely to be as true as proctor's suggestion, shipping of all kinds and character may have been moving on the bay across the course of the “Transit”, for we are unaware that vessels, entering and leaving and navigating about the great harbor of San Francisco, cease their operations with the coming of night. If the number of vessels possible to be encountered were the determining factor, doubtless *The Martello* upon the ocean would have been privileged with a higher speed than that permitted a vessel in San Francisco harbor. The point is that no reason exists for not applying to a vessel navigating in a harbor of one of the world's great ports, the same requirement of speed as to a vessel approaching, on the high seas, the entrance to New York harbor.

But even assuming that the suggestions of counsel distinguish the case, the speed of the “Transit”, 7 knots, still falls within the condemnation of *The Pennsylvania*, for the latter was held in fault for that identical rate while navigating the high seas, 200 miles outside of Sandy Hook. If that was excessive, we are at a loss to understand how a similar rate of speed in the harbor was not undue!

Granting, however, that the speed is not to be condemned, *per se*, still it comes within the reason of the

rule against immoderate speeds. Judged by *The Nacoochee*, and all that long line of cases wherein the same rule has been restated and applied by the Supreme Court, the "Transit" was grievously in fault, for she was admittedly traveling at such a speed that she could only be stoped in 800 or 900 feet, in a fog so dense that she could only see the "Fullerton" 200 feet. Her speed, then, was undue if the rule required her to maintain only such a rate as would enable her to come to a standstill by reversing her engines at full speed, before she should collide with a vessel which she should see through a fog.

Proctor impliedly admits the fault of the "Transit" if that be the test of moderate speed, but he denies the rule by suggesting that the Supreme Court, when it used the words "which she should see through the fog," in *The Nacoochee*, meant "which she should see or hear through the fog." Not only has the rule been stated too often in the same words to admit of controversy as to its meaning, but the suggestion of proctor reduces itself to an absurdity. Take, for instance, the "Beaver"- "Selja" case, decided by the District Court for the Northern District of California, where the record showed that the "Selja" heard the "Beaver's" whistle fifteen minutes before the collision. Can it be urged that moderate speed only required that the "Selja" be going at such a rate that she could be stopped in fifteen minutes? Hardly, for that would make possible full speed in a fog where the vessels might only be able to see each other a ship's length off. The vagaries of sounds in the fog have been often commented upon by

the courts. How, then, could any master tell from what distance he might be hearing a fog signal? If he could not, there would be no criterion by which to safely regulate the speed of his vessel, for the same speed might be immoderate as to one approaching vessel, and moderate as to another, depending upon the fog penetrating qualities of the approaching whistles. By such a rule, two vessels, duplicates as to design, size and power, might be traveling at the same speed in the same fog, and one be held in fault, and the other free of blame, by the circumstance of the latter having the louder whistle. It but shows how unsound is the construction which proctor would have this court give to the rule laid down by the Supreme Court in terms which admit of no ambiguity.

The hypothetical case offered by proctor to illustrate the reason for a modification of the rule formulated by the Supreme Court, only serves to demonstrate the wisdom of the rule as now applied. If a fog were so dense that two vessels could only see each other 10 feet apart, it was time they stopped, for manifestly their navigation could be continued only at the positive peril to life and property.

The reason for the rule requiring reduction of speed is to obviate just that possibility.

It is no defense that the "Transit" could not travel slower and keep steerageway, for the Supreme Court has adversely spoken upon that point in *The Pennsylvania*, 19 Wall. 125, and the same rule has been applied in the English courts.

The Campania, 9 Asp. M. C. 151.

There is neither showing nor reason why this freight carferry should, because of her construction, be removed from the operation of the rule which governs every other vessel. True, she was made to run just as other vessels, but if she could not do so in a fog, at a speed which did not endanger the safety of others, and in conformity to the rules governing all vessels, it was her duty to remain dormant until the fog passed.

It may be, as said in the case of

Wright & Cobb Lighterage Co. v. New England N. Co., 189 Fed. 809, 814,

cited by proctor, that public interests require that ferry boats make their regular trips even in very thick fog, but that constitutes no reason for holding that a *freight* carferry, of such design and construction that at lowest speed she cannot be stopped in less than 800 feet, and then not immediately reversed from ahead to full speed astern, may run at a speed in positive violation of the rules prescribed by the Supreme Court in its numerous decisions.

We respectfully submit that the decree of the District Court should be reversed in accordance with the prayer of our opening brief.

Dated, San Francisco,
December 6, 1913.

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

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*Proctors for Appellant and
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